IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 227/09

Date delivered: 30 March 2010

In the matter between:

CHEMICAL SPECIALITIES (PTY) LTD Applicant/Plaintiff

and

HUMANSDORP PAINT CENTRE CC Respondent/Defendant

JUDGMENT

EKSTEEN, J:

[1] This is an application for the amendment of the Particulars of the plaintiff's Claim. I shall refer to the parties herein as they are in the action.

[2] In its Particulars of Claim, as currently formulated, the plaintiff alleges:

> "3.
>
> During or about February 2007 and at Humansdorp, the Plaintiff and the Defendant concluded a written agreement, the terms of which would apply to all transactions between the parties.
>
> 4.
>
> A copy of the agreement is attached hereto, marked "A".
>
> 5.
>
> In concluding the agreement:
>
> 5.1. the Plaintiff was represented by its authorised employees;
>
> 5.2 the Defendant was represented by Mr J Lissner, he being duly authorised thereto as a Member.

6.

In terms of the agreement:

6.1 The Plaintiff would sell from time to time, to the Defendant, its goods on credit;

6.2 The Defendant would:

6.2.1 pay to the Plaintiff its ruling or agreed prices;

6.2.2 make payment for goods within a period of 30 days from the date of the Plaintiff's statement of account in respect thereof;

6.3 …

8.

The Plaintiff duly delivered the goods which the Defendant purchased.

9.

The Plaintiff duly rendered statements of account to the Defendant for payment of the purchase price.

10.

The Defendant having failed to make payment of any statement on due date (being 30 days from date of receipt of statement of account), all amounts owing by the Defendant to the Plaintiff are immediately due and payable.

11.

The balance of the purchase price for such goods which the Defendant has not paid, is the aggregate amount of R905 132.81, as reflected in the Tax Invoices annexed hereto marked "B1" and "B2".

12.

The National Credit Act, 34 of 2004 is not applicable in as much as no charge, fee, nor interest has been levied against the Defendant.

13.

In the alternative, should the above Honourable Court find that a charge, fee or interest has been levied against the Defendant, then Plaintiff pleads that the agreement upon which Plaintiff's action is founded is exempted from the provisions of the National Credit Act, 34 of 2005 as the Defendant is a juristic person and has an asset value or annual turnover equal to or over R1 000 000.00 alternatively the agreement upon which Plaintiff's action is founded constitutes a large credit agreement with a juristic person whose asset value or annual turnover is less than R1 000 000.00."

[3] The defendant served a notice in terms of rule 23 of the Uniform Rules of Court on the plaintiff alleging that the Particulars of Claim were vague and embarrassing. It raised two grounds. Firstly, the defendant contended that the alleged agreement, Annexure "A" to the Particulars of Claim did not constitute an agreement and was merely a unilateral application for credit. It is not signed on behalf of the plaintiff. In the second ground raised it is contended that Annexures "B1" and "B2" relate to stock delivered prior to the application for credit and that the agreement relied upon could not apply to these invoices.

[4] This notice prompted an application for an amendment to the pleadings. The relevant portion of the Notice of Intention to Amend reads as follows:

"1. By the deletion of the existing paragraph numbered 11 and substituting therefore the following:

"11.

The value of the purchase price for the said goods, which purchase price the Defendant has not paid, is the sum of

R124 235.63, as reflected in the tax invoice annexed hereto marked “B2”.”

2. By the removal of annexure “B1” as an annexure to the Particulars of Claim.

3. By the inclusion of the following additional paragraphs:

“12.

In or about the period September/October 2006, and in Durban, an oral agreement was concluded between the Plaintiff and the said Mr J Lissner (“Lissner”).

13.

In concluding the said agreement the Plaintiff was represented by one, S Barron-Wood and Lissner acted in person.

14.

The material terms of the said oral agreement were that Lissner would acquire from the plaintiff the assets of the business known as E P Paint & Hardware, including its stock in trade, against payment of the sum of R779 897.18.

15.

During or about December 2006, and at Durban, alternatively Humansdorp, the Plaintiff, Lissner and Defendant, represented by Lissner, tacitly agreed that Defendant would assume from Lissner all the rights and obligations under the agreement referred to in paragraph 14 above.

16.

In the premises, with effect from December 2006 the Defendant became liable to pay to Plaintiff the said sum of R779 897.18 by reason of the fact that Lissner had not, prior to the agreement referred to in paragraph 15, discharged the said debt which he owed to the Plaintiff.”’

[5] It may be seen from the Notice of Intention to Amend that, notwithstanding the numbering set out therein paragraphs 12 and 13 of the original Particulars of Claim are not deleted. I shall, for purposes hereof

assume, in favour of the applicant, that paragraphs 12 and 13 of the original Particulars of Claim remain.

[6] The aforestated Notice of Intention to amend was again met with by an objection. In respect of the newly formulated paragraph 11 which the plaintiff seeks to introduce the defendant's objection reads as follows:

> "3. In terms of the amended paragraph 11 it is alleged that goods in the amount of R125 235,63 were delivered in terms of the agreement set out hereinabove.
>
> 4. Annexure "B2" refers to "*Humansdorp stock January 2007*" and it is impossible for the said stock to be delivered in terms of an agreement only concluded in February 2007."

[7] The objection to the remainder of the intended amendment is aimed at the new paragraph 15 in the proposed amendment which seeks to place reliance of a "tacit agreement". The defendant contends that a plaintiff relying on a tacit agreement has to set out the conduct and the circumstances on which the party relies for its allegation that a tacit agreement was concluded. The defendant accordingly resists the amendment.

[8] The court will usually allow an application to amend unless it is made *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 purposes of justice in the same position as they were when the pleadings which it is sought to amend were filed. See for example ***Moolman v Estate Moolman*** 1927 (CPD) 27 at 29. Where, however, the granting of the application for amendment would render the

pleading excipiable the court will not grant an amendment. See for example ***De Klerk and Another v Du Plessis and Others*** 1995 (2) SA 40 TPD at 43I-44A and the authorities discussed therein. The defendant in the present instance contends that permitting the amendment would render the pleading excipiable.

[9] The objection to paragraph 11 of the proposed amendment is to be found in the formulation of Annexure "B2". Annexure "B2" is a tax invoice issued by the plaintiff on 23 March 2007 reflecting the goods sold as "Humansdorp stock January 2007". On this basis alone, the defendant contends that it is impossible for these goods to have been delivered pursuant to the application for credit which was submitted on 16 February 2007. The description 'Humansdorp stock January 2007" is, however, no more than a description of the goods sold and delivered. It has no bearing upon the date upon which the goods were either sold or delivered. The plaintiff contends that these goods were delivered pursuant to the agreement which is set out in paragraph 3 of the Particulars of Claim, being the agreement to deliver goods on credit. When the goods were in fact sold and delivered appears to me to be a matter of evidence which cannot be determined at this stage. The fact, however, that the goods are described with reference to a stock take which preceded the agreement relied upon is neither here nor there.

[10] The amendment set out in the proposed new paragraphs 12-16 in the Notice of Intention to amend sets out a separate cause of action in respect of the amount of R779 897,18 which is claimed in paragraph 16. The tacit

agreement relied upon in the proposed new paragraph 15 is fundamental to this claim. Rule 18(6) of the Uniform Rules of Court provides that it is not necessary in any pleading to state the circumstances from which an alleged implied term can be inferred. Whether the rule was intended to refer only to an implied term, in the strict sense, or whether it was intended to incorporate also a tacit term is not material to the present enquiry. The rule relates only to a term included in an express agreement. Where reliance is placed on a contract which has been tacitly concluded it is necessary for the pleader to set out in his pleadings the facts and circumstances upon which reliance is placed for the conclusion that the parties intended to contract on the terms contended for. See ***Robert Construction (Pty) Ltd v Dominion Earthworks (Pty) Ltd and Another*** 1968 (3) 255 (AD) at 261. A failure to do so would render the pleading excipiable as it would lack averments necessary to sustain a cause of action.

[11] In the circumstances I am of view that the objection raised in respect of the proposed paragraphs 12-16 in the Notice of Intention to Amend is sound. The application for this amendment must accordingly be dismissed.

[12] The difficulty which the plaintiff faces in the event of the amendment in paragraph 11 being granted is that the Notice of Intention to Amend does not seek to amend any of the prayers. If the amendment sought to paragraph 11 were granted, while the remainder of the amendment is refused, a valid cause of action would be established in respect of the amount of R125 235,63. This would be wholly at variance with the prayer for judgment in the amount of

R905 132,81. The Particulars of the plaintiff's Claim would then be excipiable on the basis that it would be vague and embarrassing. In these circumstances I do not consider that the amendment to paragraph 11 can stand on its own and it too must be dismissed.

[13] In the result, the application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT