

IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 1529/2009  
Date Heard: 1 December 2011  
Date Delivered: 13 December 2011

In the matter between:

**ALTECH NETSTAR FLEET MANAGEMENT (PTY)**

**LIMITED**

Applicant

and

**ANERI SCHEEPERS**

Respondent

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## **JUDGMENT**

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**EKSTEEN J:**

[1] This is an application to amend the summons issued by the applicant herein and the subsequent declaration filed. A number of procedural disputes emerged from the papers filed in this application. At the hearing of the application agreement was reached in respect of these disputes and where necessary orders as were required were made. What remains for consideration accordingly is the merits of the application for amendment.

## **The history**

[2] The applicant (the plaintiff in the main action, to whom I shall refer as the applicant) issued a simple summons against the respondent (the defendant in the main action to whom I shall refer as the respondent) in which it claimed:

“Payment in the sum of **R120 458.33**, being, outstanding, due and payable by the Defendant to the Plaintiff in respect of Services Rendered by the Plaintiff to the Defendant, for the period up to May 2008, at the latter’s special instance and request, in terms of an written agreement, marked Annexure “A”.”

[3] Annexure “A” to the summons (to which I shall refer as “annexure A”) consists of a document headed “Vigil Transaction Schedule” signed by the respondent and dated 23 August 2006 together with a number of other documents annexed thereto. Upon receipt of the summons the defendant duly entered an appearance to defend and summary judgment proceedings followed. Thereafter the plaintiff filed a declaration. In the declaration the plaintiff alleges:

“3. On or about 23 August 2006, and at Port Elizabeth, a written offer was made by the defendant, acting personally, to the plaintiff. A copy of the aforesaid written offer, together with annexures thereto is annexed hereto, marked annexure “POC 1.”

4. The following are the material, express, alternatively implied and/or tacit, terms of the aforesaid written offer:

4.1 ...

5. Pursuant to the aforesaid written offer by the defendant, the plaintiff, represented by a duly authorised representative, and at its head office in Midrand, Gauteng, accepted the defendant's written offer.

6. Consequently, a written agreement came into being between the parties constituted by Annexure "POC1" hereto."

(I shall refer herein to Annexure "POC1" to the declaration as "annexure POC1").

[4] And later:

- "11. As at end of May 2008, the defendant was indebted to the plaintiff in the sum of R120 458,33 in respect of services rendered by the plaintiff to the defendant, together with ancillary charges as contemplated by the agreement. A statement setting out how the balance of R120 458.33 is calculated is attached hereto marked Annexure "POC2"."

[5] The “offer” referred to in paragraph 3 of the declaration is the same “Vigil Transaction Schedule” annexed to annexure A, together with various documents reflected as annexures. Some of these annexures are dated, others are not. Those documents which are dated are all dated during August 2006.

[6] Whilst the declaration does not specifically aver a date upon which the agreement was concluded it is apparent that the applicant contends for a contract concluded during or about August 2006 and consisting of the “Vigil Transaction Schedule” signed by the respondent on 23 August 2006 and the annexure annexed thereto. A comparison, however, of the annexure A and annexure POC1 reveals that not all documents included in annexure A are included in annexure POC1. Notwithstanding this inconsistency the respondent did not contend that the declaration was vague and embarrassing and did not raise an exception. It proceeded to plead to the declaration. In its plea it admitted only that annexure POC1 was annexed to the declaration but denied the further averments contained in paragraph 3 thereof. It then proceeded to plead as follows in respect of paragraphs 3, 4 and 5 of the declaration:

"3.2 In amplification to the denial aforesaid, the Defendant pleads:

3.2.1 At all times material to the offer being made by the Defendant to the Plaintiff, the Defendant acted as the authorised agent of Alpha Omega Plant Hire (Pty) Limited trading as Alpha Omega Plant Rentals ("Alpha Omega") in terms of a written authority, "A" hereto.

3.2.2 The Plaintiff's representative, one Cuan Smith, ("Smith") was at all times material to the completion and submission of "POC1" by Defendant, aware of the capacity in which the Defendant signed "POC1", to wit, as the disclosed and authorised agent of Alpha Omega.

3.2.3 Accordingly, the Defendant is not liable to the Plaintiff as claimed or at all.

3.3 The Defendant pleads that in the event that this Honourable Court finds that she signed the written offer in her personal capacity, and in that event only, the Defendant pleads that:

3.3.1 The written offer, "POC1" was entered into by the Defendant in the *bona fide* and reasonable but erroneous belief that she was acting as the disclosed and authorised agent or representative of the Alpha Omega as contained in "A" hereto; and

3.3.2 Plaintiff, represented by Smith, appreciated that the Defendant signed the written offer, "POC1", under the misapprehension that she was acting as aforesaid, and not in her personal capacity.

3.3.3 Accordingly, the written offer "POC1" is unenforceable and the Defendant is not liable to the Plaintiff as claimed or at all.

4. **AD PARAGRAPH 4:**

4.1 Insofar as the sub paragraphs 4.1 to 4.24 purport to be a summary of the terms of "POC1", they are admitted, but to that extent only.

5. **AD PARAGRAPH 5:**

5.1 The Defendant has no knowledge to the averments contained in this paragraph and makes no admissions thereanent and put the Plaintiff to the proof thereof."

[7] This was followed by a replication filed by the applicant in which it denied the essential averments pleaded in paragraph 3 above. The replication was followed by a rejoinder filed on behalf of the respondent. All of these pleadings were filed pursuant to the case set out in the declaration. It is apparent from the pleadings that central dispute

between the parties is not so much the terms of the agreement pleaded but rather the capacity in which the respondent acted in concluding the agreement, alternatively the *bona fide* belief which she held in respect of her capacity.

[8] Sometime after the close of pleadings the applicant filed a notice of intention to amend. What remains of the notice of intention to amend, after the agreements reached to which I have referred above, is an application to delete from the simple summons two documents annexed as part of annexure A and which do not appear in annexure POC1 and to insert three documents in annexure POC1 which do appear in annexure A.

[9] A notice of objection was duly delivered. The essence of the objection relates to the deletion of the two documents from annexure A. The first is a very brief authority issued unilaterally by Alpha Omega. It purports to authorise the respondent, on their behalf, to install Altech Netstar's Vigil and VDU450 (Early Warning Systems) in their vehicles as discussed and agreed with them.

[10] The second document is a letter dated 22 August 2006 ostensibly signed on behalf of Alpha Omega Plant Rentals, the applicant and by the defendant. This document is on an Alpha Omega Letterhead and the

significant portions thereof record as follows:

“The following were agreed to by both parties:

1. Aneri Scheepers will enter into an agreement with Altech Netstar.

2. Aneri Scheepers will cede or delegate her rights and obligations in terms of the agreement with Altech Netstar to Alpha Omega Plant Rentals (Pty) Limited for the duration of her association with Alpha Omega Plant Rentals (Pty) Limited.

3. ...

4. ...

5. The following changes will be affected to the standard Altech Netstar Agreement:

- 5.1 ...”

[11] The essence of the objection is to be found in paragraphs 5 and 6 of

the notice of objection. The respondent contends that these documents constitute a material part of the Agreement relied upon by the applicant and that its deletion from the declaration (*sic*) would have the effect of substituting the Agreement relied on in the summons with an Agreement which is materially different from that originally pleaded and which has the effect of introducing a new cause of action against the defendant which has prescribed and is thus objectionable.

### **Legal position**

[12] In the consideration of an application for amendment the primary principle as it has developed in our law is that an amendment will be allowed in order to permit the proper ventilation of the dispute between the parties so as to determine the real issues between them in order that justice may be done. Flowing from this primary principle it follows that an amendment will usually be granted unless the application is *mala fide* or will result in an injustice to the other side which cannot be compensated for by an award for costs. Compare ***Trans-Drakensberg Bank Limited v Combined Engineering (Pty) Limited and Another*** 1967 (3) SA 632 (D&CLD) at 638A-B and the authorities set out therein.

[13] In the present matter the claim was initiated by a simple summons. Where the claim is for a "debt or liquidated demand", as was the case in

this matter, the form of the summons does not embody all the particulars of claim, although it must set out the nature of the claim. It is a feature of this kind of summons that it is followed in due course by full particulars of claim in the form of a declaration, only if the defendant delivers a notice of intention to defend. The declaration must then set out the full particulars of the plaintiff's claim. In ***Hermansberg Mission Society v Minister for Native Affairs and Others*** 1910 TPD 832 at 837 Wessels J stated as follows:

"... I think it is inherent in the very nature of pleadings that there should be some practice whereby the declaration shall not materially vary from the summons ...

(T)he summons must contain an indication of what the defendant is to expect in the declaration; but it need contain no more than that. The declaration must not introduce a new and totally different cause of action, of which no mention was made in the summons. So long, however, as the declaration contains matter which elaborates what is set out in the summons, or which is akin to the claim set out in the summons, the variance is not such as to justify the court in setting aside the declaration. The court will not pay any regard to a variation which does not embarrass the defendant, and of the subject matter of which there is sufficient indication in the summons."

I think that this dictum remains equally apposite today.

[14] In the present instance the simple summons sets out the nature of

the claim. The applicant therein claimed payment of a sum of "money due and payable by the defendant" in respect of "services rendered by the plaintiff to the defendant" in terms of a written contract "entered into with the respondent". The simple summons alleged that the contract consisted of a bundle of documents marked "A" from which it is apparent that the agreement contended for was concluded during or about August 2006 as a result of the "Vigil Transaction Schedule" signed by respondent on 23 August 2006.

[15] The claim set out in the declaration is for the self same sum of money which is alleged to be due in respect of "services rendered by the plaintiff to the defendant", together with ancillary charges as contemplated in the Agreement. The declaration contends for an Agreement concluded during or about August 2006 pursuant specifically to the "Vigil Transaction Schedule" dated 23 August 2006. It accordingly contends for precisely the same cause of action set out in the simple summons.

[16] As is evident from the history of the pleadings set out above that the respondent did not feel herself "embarrassed" by the differences between the summons and the declaration, on the contrary, she proceeded to plead to the declaration without demur. She did not in her plea contend that the contract contained additional terms as set out in the

further documents in annexure A.

[17] The amendment now sought is aimed at bringing the summons and the declaration in line with one another and to clarify the terms of the agreement on which the applicant relies. The applicant in his application for amendment avers that when the simple summons was issued it was represented by a firm of attorneys who drafted the documentation. Thereafter a change of attorneys occurred and after consulting at length with the new attorneys the declaration was drawn by the new attorneys on the strength of the instructions received during consultations. The applicant accordingly contends that the declaration relies on the self same Agreement that was relied upon in the summons save that some of the documents included in annexure A do not in fact form part of the Agreement and ought not have been annexed.

[18] I do not consider that the variation contended for creates a different cause of action. The applicant claims money is due to it by the respondent in respect of services rendered pursuant to a written Agreement concluded during on or about August 2006 pursuant to the "Vigil Transaction Schedule" annexed both to the summons and the declaration. There is now a dispute in respect of the terms of the Agreement. The applicant wishes to contend that the contract is constituted as it contends in the declaration as supplemented by the

amendment which it now seeks so as to permit the proper ventilation of the real issues between them. To that end it seeks to bring the summons in line with the declaration. No basis has been laid for me to find that the application is *mala fide*. Prejudice is not raised in the objection and I do not think that prejudice to the respondent arises. The claim is a contractual one and accordingly the applicant will bear the onus to establish the terms of its contract, even if it has to show that the documents now deleted did not form part of the agreement. The respondent remains entitled to plead that these documents did form part of the contract thus casting the said onus on the applicant. I think that the applicant is entitled to amend its pleadings accordingly.

[19] What remains for consideration is the costs occasioned by the application. I have recorded above that certain procedural disputes existed between the parties which were resolved prior to the argument of the application and in respect of which orders were made at the commencement of the hearing. The costs occasioned by the opposed application relate in my view solely to the respondent's opposition to the amendment set out in paragraph 2 of the notice of intention to amend the summons and paragraph 1 of the notice of intention to amend the declaration. It follows from what I have set out above that I do not consider that there was merit in the opposition to these amendments. In the circumstances, in the exercise of my discretion I consider it to be fair

that the respondent be ordered to pay the costs occasioned by the opposition to the application for the amendment considered herein.

[20] In the result I make the following order:

1. The applicant is granted leave to amend the summons by the deletion from annexure A to the summons of the following documents:

1.1 the undated document on the letterhead of Alpha Omega Plant Rentals titled "TO WHOM IT MAY CONCERN"; and

1.2 the letter dated 22 August 2006 on the letterhead of Alpha Omega Plant Rentals addressed to the defendant.

2. The applicant is granted leave to amend its declaration by the inclusion and addition of the following documents currently attached as part of

annexure A to the summons, in annexure POC1 to the declaration:

2.1 Vehicle list (page 5 of Pleadings Bundle);

2.2 Alarm response sheet and unit configuration for the Netstar Vigil Response Centre (two pages – pages 6 and 7 of Pleadings Bundle); and

2.3 A copy of the defendant's identity document (page 8 of the Pleadings Bundle).

3. The respondent is ordered to pay the costs occasioned by the opposition to the application for an amendment.

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**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**

*Appearances:*

*For Applicant:* Adv Dyke instructed by Besters, Port Elizabeth

*For Respondent:* Adv Mullins instructed by Robert Mitchley Attorney, Port  
Elizabeth