

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: 2446/2013

In the matter between:

RGT SMART OPERATIONS (PTY) LTD **Applicant**
(Plaintiff in the main action)

And

VERLAG AUTOMOBIL WIRTSCHAFT (PTY) **Respondent**
LTD T/A ARVATO SOUTH AFRICA
(Defendant in the main action)

JUDGMENT

BESHE J:

[1] The parties are competitors in providing customer satisfaction services to the motor body repairer industry. They are involved in litigation wherein plaintiff seeks damages against the defendant based on the delict of unlawful competition. The defendant has in turn instituted a claim in reconvention against the plaintiff contending that the latter has disseminated incorrect and defamatory information about the defendant to the “relevant market”.

[2] The present proceedings are concerned with an application by the plaintiff for leave to amend its particulars of claim in terms of *Rule 28 of the Uniform Rules* of this court.

[3] The application is opposed by the defendant. The basis upon which the proposed amendments are objected to is that they do not provide details or lack particularity that is necessary to disclose a cause of action and that it will be difficult for the defendant to plead thereto. This turn will cause prejudice to the defendant in conducting its defence. Further that the proposed amendments are inchoate, do not constitute a cause of action and would render the particulars of claim excipiable.

[4] Paragraphs sought to be amended are paragraphs 8, 11 and 12 of plaintiff's particulars of claim by the insertion of subparagraph thereto.

[5] The defendant has already filed its plea to the particulars of claim as they stand (before the amendments sought). In some instances defendant went so far as to amplify its response.

[6] The current relevant particulars of claim read as follows:

"8. At all material times and until 23rd January 2013, one Justin Stuart Swanepoel (Swanepoel) was employed by the plaintiff as Manager of the SQS System".

Paragraph 9 and 10 read as follows:

"9. Swanepoel's employment with the plaintiff was subject to 3 agreements, all dated 7 February 2012, copies of which are attached hereto marked as A, B and C.

10. Annexure C hereto is a confidentiality agreement, which protects the plaintiff's customer connection and confidential information."

[7] The proposed additions to paragraph 8 by means of the amendment read as follows:

"8.2 In his capacity as an employee of the plaintiff, Swanepoel acquired confidential information, relating to the identity and needs of the plaintiff's customers, the

plaintiff's business practices and the plaintiff's contractual arrangements with the plaintiff's customers.”

[8] The proposed addition to paragraph 11 reads: The defendant:

“11.5 utilized the confidential details of the plaintiff's SQS system, and the plaintiff's other information as set out in paragraph 8.2 above, as a springboard in order to obtain an unfair and improper head start over the plaintiff in the market place.”

[9] The proposed amendment to paragraph 12 reads:

“12.4 The defendant competed unlawfully with the plaintiff by acting in the manner described in paragraph 11.5 above.”

[10] It was submitted on behalf of the plaintiff that all that the amendments seek to do, is to broaden the scope of the present cause of action – unlawful competition. This as a result of information obtained recently from a belated discovery of various documents and correspondence by the defendant.

[11] It is trite that the primary objective of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.¹ The following was stated regarding the approach to be taken in applications for amendments in ***Moolman v Estate Moolman***:²

“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 will cause an injustice to the other side which cannot be compensated by costs, or in other words

¹ Erasmus Superior Court Practice 2nd Edition Vol. 2 Serice 1, 2016 D1 – 332.

² 1927 CPD 27 at 29 quotation appears in same page as the authority quoted in footnote 1.

unless the parties cannot be put back for the purposes of justice in the same position they were when the pleading which is sought to be amended was filed.”

[12] So amendments will as a general rule be granted save in circumstances where such an amendment or amendments will result in prejudice or injustice to the other party.³

[13] Having heard *Mr Buchanan SC* for the plaintiff and *Mr McNully SC* for the defendant and having read papers filed of record, I am not persuaded that the proposed amendments will prejudice the defendant in the conduct of its defence. I am not persuaded that the application is *mala fide* – this has not been alleged by the defendant in any event. In my view the proposed amendments are aimed at clarifying or amplifying an already averred cause of action in respect of which defendant had no difficulty pleading thereto.

[14] Accordingly, leave is granted to the plaintiff to amend its particulars of claim as set out in plaintiff’s notice to amend in terms of Rule 28 (1) dated 2 August 2016.

Plaintiff is ordered to pay the costs of the amendments.

Defendant is ordered to pay the costs of the opposition. Such costs to include costs consequent upon the appointment of two counsel.

N G BESHE
JUDGE OF THE HIGH COURT

³ *Devonia Shipping Ltd v Luis (Yeiman Shipping Co. Ltd intervening)* 1994 (2) SA 363 at 369.

APPEARANCES

For the Applicant : Adv: Buchanan SC and Adv: Ronaasen
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Date Heard : 23 August 2016

Date Reserved : 23 August 2016

Date Delivered : 25 August 2016