

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

Case No.: 1554/2018

Date Heard: 8 February 2019

Date Delivered: 19 February 2019

In the matter between:

SHONES AUTOMATION (PTY) LIMITED
(Registration Number: 2015/190926/07)

Applicant

and

SMOKEY MOUNTAIN TRADING 444 (PTY) LIMITED
t/a MECHATRONICS
(Registration Number: 2005/025456/07)

Respondent

JUDGMENT

GAJJAR AJ:

Introduction

[1] This is an application in terms of Rule 28(4) in which the applicant, Shones Automation (Pty) Ltd, as plaintiff in the action seeks to amend its particulars of claim pursuant to a notice of objection filed by the respondent, Smokey Mountain Trading 444 (Pty) Ltd t/a Mechatronics.

[2] For the sake of convenience I shall refer to the parties as in convention.

[3] Although the plaintiff's application is brought outside the ten day period referred to in Rule 28(4), the defendant does not join issue with the delay and thus no more need be said about that.

The defendant's grounds of objections

[4] The defendant objects to the plaintiff's proposed amendment of its particulars of claim on two grounds, namely that:

4.1 The plaintiff's claim does not allege that the damages claimed are reasonable¹;

4.2 It is impossible, upon a proper reading and construction of the particulars of claim, as read with annexures "POC2" to "POC7", to determine what work was undertaken in order to remedy the allegedly defective work and what portion of the invoices is reduced by the aggregate sum of €61 000.

[5] Faced with the aforesaid objections, the plaintiff brought the present application supported by a founding affidavit, to which the defendant filed an answering affidavit and the plaintiff having elected not reply thereto.

The proposed amended particulars of claim

[6] In its proposed amended particulars of claim the plaintiff pleaded that it was awarded a contract by Eisenmann South Africa (Pty) Ltd ("company E") to perform works and services which included electrical installations. Following the conclusion of that contract a subsequent oral agreement was entered into between the plaintiff and the defendant, both duly represented by their respective representatives. The plaintiff has further pleaded that the material, express, alternatively tacit, alternatively implied terms of the oral agreement were, *inter alia*, the following:

6.1 The defendant would provide to the plaintiff a PLC programmer to work on site on behalf of the plaintiff on the company E contract;

¹ The defendant did not persist with this ground of objection.

- 6.2 That the PLC programmer would have the necessary training, experience, qualification and skill to install and operate and manage the appropriate and necessary PLC program;
- 6.3 That the PLC programmer provided by the defendant would perform his services in a proper and workmanlike manner and in accordance with the requirements of company E; and
- 6.4 That the defendant would charge the plaintiff for the PLC programmer at a rate of R600 per hour.

[7] The plaintiff relies on the defendant's alleged breach of the oral agreement in that it provided a programmer who did not have the necessary training, experience, qualifications and skill to install, operate and manage the necessary PLC programme. Following such alleged breach, the work performed by the defendant's programmer had to be rechecked and corrected by a third party and company E was invoiced for all necessary and related costs thereof. The plaintiff in its proposed amended particulars of claim has attached seven invoices made out to company E which totals €203 855.01.

[8] In paragraph 7 of the particulars of claim, the plaintiff contends that the total sum of €203 855.01 was reduced by the sum of €19 000 and €42 000 respectively for which it and company E were not liable leaving a balance of €142 855.01. This amount was then reduced by 50% as the third party gave company E a 50% discount. Company E's indebtedness to the third party was thus €71 427.51, being the amount, plus 14% VAT which the plaintiff claims from the defendant.

[9] It is the setting out of the total value of the seven invoices as well as the deductions set out in paragraph 7 of the proposed amended particulars of claim which is the main cause of the defendant's complaint.

[10] As part of the plaintiff's proposed amended particulars of claim it has attached an annexure from company E, being annexure "POC8". It is this invoiced amount

which the plaintiff claims from the defendant, less the amount of R113 177.00 as set out in paragraph 9.1 of the proposed amended particulars of claim.

[11] The defendant submits that it is impossible to determine from the proposed amended particulars of claim, as read with the annexures thereto, as to which alleged services referred to in the annexures are not for its account. The defendant further submits that the plaintiff, at the very least, is required to specifically stipulate what portion of the attached invoices are not for its account.

[12] The defendant, however, does not address the contents of annexure “POC8”, being the invoice from the company E to the plaintiff. I will return to this issue below.

Pleadings: the applicable rules and legal principles

[13] Rule 18(4) provides that

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto”; and

[14] Rule 18(10) requires that

“A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof: ...”

[15] There is no exhaustive test to determine whether a pleading contains sufficient particularity, the test being whether the pleading identifies and defines the issues in such a way that it enables the opposite party to know what they are.²

[16] The defendant has submitted that the provisions of Rule 18(4) should be read conjunctively with the provisions of Rule 18(10) in regard to the particulars required

² See *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 798F-799J

when claiming damages. In Grindrod (Pty) Ltd v Delport and Others³ Blieden J stated the following with reference to Rule 18(4) and 18(10):

“It seems to me that these two sub-rules have entirely different functions and are not in any way related.

Rule 18(4) relates to the pleading of facts which makes up either a claim, defence or answer. Here the requirement is that such facts be pleaded with ‘sufficient particularity to enable the opposite party to reply thereto’.

The purpose of Rule 18(10) is to ensure that in damages claims the plaintiff sets out such a claim ‘in such a manner as will enable the defendant to reasonably assess the quantum thereof.’

[17] I align myself with the afore-going view and thus do not favour the approach advocated on behalf of the defendant.

[18] The defendant has accepted that it has a duty to work out what is a reasonable assessment of damages sustained by the plaintiff⁴, but submits that this principle cannot logically be extended to require of a defendant to work in the unknown.

[19] During the course of his argument, Mr **Friedman**, for the defendant submitted that this unknown is with particular reference to what is set out in paragraph 7 of the plaintiff’s proposed amended particulars of claim. Countering this, Mr **White**, for the plaintiff, submitted that the deductions and discount set out in paragraph 7 is a matter between the plaintiff and company E and is of no concern of the defendant. Upon enquiring from Mr **White** whether it was so that the plaintiff’s claim against the defendant is that which is set out in annexure “POC8”, being the invoice from company E to the plaintiff, Mr **White** answered in the affirmative. Accordingly, the plaintiff, it would seem to me, could easily and simply have annexed the invoice,

³ 1997 (1) SA 342 (W) at 346F-G

⁴ See *Thonar v The Union and South West Africa Insurance Co Ltd* 1981 (3) SA 545 (W) at 551C; *Minister van Wet en Orde v Jacobs* 1991 (1) SA 944 (O) at 952I-953C

annexure “POC8”, without the need to have annexed the invoices marked “POC1” to “POC7”.

[20] However, Mr **White** was unable to explain where the deduction amounts of €19 000 and €42 000 is reflected in any of the documents. He submitted that these deductions and the 50% discount are matters of evidence.

[21] The defendant contends that the plaintiff is obliged to furnish precise details regarding the invoices, being annexures “POC2” to “POC7” as to which portions of those invoices are not for the defendant’s account and by failing to do so the defendant is prejudiced and unable to respond either in terms of Rule 18(4) or in terms of Rule 18(10).

[22] It was further submitted that to grant the amendment sought by the plaintiff would be to permit the filing of an excipiable pleading in that it would be vague and embarrassing on the basis that it lacks particularity.

[23] Having further considered the proposed amended particulars of claim, it would seem at first blush that the plaintiff has unintentionally created a potential difficulty for itself in having attached annexures “POC2” to “POC7” and by having made the allegations as set out in paragraph 7. That being said, does it then lay in the mouth of the defendant to complain when the plaintiff has in fact pleaded more than was necessary?

[24] Of importance, in my view, is that there is no dispute as to the plaintiff’s cause of action. At its core the plaintiff is seeking payment of the amount company E had invoiced it with reference to the third party.

[25] The question is what would the defendant’s complaint have been had the plaintiff only attached the invoice from company E, annexure “POC8”?

[26] In my view, the fact that the plaintiff has pleaded extraneous matter in paragraphs 6 and 7 of its proposed amended particulars of claim does not disable

the defendant from assessing the quantum of the claim and thus it is able to plead thereto.

[27] In the result, I am not persuaded that the objection can be upheld

[28] Accordingly, the following order shall issue:

28.1 the objection is dismissed;

28.2 the plaintiff's particulars of claim is amended in accordance with annexures "C" and "D" to the founding affidavit;

28.3 the costs of the application shall be borne by the defendant.

G J GAJJAR

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Mr G Friedman of Friedman Scheckter Attorneys,
Port Elizabeth

For Respondent: Adv A White instructed by Pagdens Attorneys, Port Elizabeth