IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 2877/2021

In the matter between:

MEDICROSS HEALTHCARE GROUP (PTY) LTD Plaintiff/Respondent

and

DR J D VAN DER MERWE & ASSOCIATES INC 1st Defendant/Applicant

DR J ZURICH & ASSOCIATES NO. 68 INC. Second Defendant

NEDBANK LIMITED Interested Party

CORAM: VAN RHYN, J

HEARD ON: 24 AUGUST 2023

DELIVERED ON: 1 NOVEMBER 2023

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[1] The first applicant prays, in terms of the provisions of Rule 24(1) of the Uniform Rules of Court, for leave to file a counterclaim.

[2] The application is opposed by the respondent on the following grounds:

2.1 The applicant has failed to provide reasonable and acceptable grounds for its failure to timeously deliver its counterclaim; and

2.2 On a construction of the time periods applicable, any contemplated counterclaim has become prescribed;

2.3 The applicant has instituted a damages claim resultant from breach of contract in another division of the High Court. Further claims cannot follow in circumstances where the 'once and for all' rule should apply.

[3] The respondent, Medicross Healthcare (Pty) Ltd issued summons against the applicant, Dr JD van der Merwe & Associates Inc. (as first defendant) and Dr J Zurich & Associates No 68 Inc. (as second defendant) on 24 June 2021 following the conclusion of an Administration Agreement, a Loan and Financing Agreement and Cession of Book Debts agreement, referred to by the parties as the trio of agreements. The third defendant is Nedbank Limited, a commercial bank.

[4] It is alleged that since 2007, the respondent performed in terms of the trio of agreements and rendered the services envisaged by the parties to the second defendant. Subsequent to the named director of the second defendant, Dr J Zurich sought to leave the practice of the second defendant during 2014, the respondent and the remaining directors of the second defendant continued, after a name change, with the operation of the practice under the name and guise of the applicant until the termination of the trio of agreements on 30 May 2019.

[5] It is alleged in the particulars of claim that the name change never occurred as intended by the parties and that the applicant was registered as a new corporation. Following a meeting on 25 June 2019 it was agreed orally that no name change to the trio of agreements are required and that the trio of agreements would thus continue as such. The respondent prays for the rectification of the trio of agreements and alternatively, in the event that the court finds that there does not exist a basis to rectify the trio of agreements, that the respondent and the applicant on certain dates, expressly and/or tacitly agreed to proceed as the parties to the trio of agreements and gave effect thereto.

[6] The respondent furthermore prays for payment of the sum of R 190 741.56 with interest and costs from the applicant, alternatively payment of the same amount from the second defendant, with further consequential relief. In their amended plea (filed on 15 February 2022) the applicant and the second defendant deny that they have entered into any written agreements with the applicant. The applicant and the second defendant

have never been signatories to such agreements and have never acceded to the terms thereof.

[7] It is pleaded that the applicant and the respondent have entered into a tacit agreement, referred to as "the Real Agreement" which came about during 2014 or 2015 when the respondent commenced rendering administration services to the applicant without the parties having concluded any written or oral agreement. It is alleged that the respondent breached the terms of the Real Agreement by, *inter alia*, failing to account to the applicant for monies drawn by the respondent from the applicant and second defendant's bank account, acted in contravention of certain regulations relating to the Banks Act[1], made a secret profit and failed to exercise due skill and diligence in performing its mandate in terms of the Real Agreement.

[8] On 9 September 2019 and following an urgent application brought by the respondent, this court granted an interim order, *inter alia*, directing Nedbank (cited as an interested party in this application) to keep an available balance of R500 000.00 (five hundred thousand rand) in a specific bank account, presumably that of the applicant, pending final adjudication of the application.

[9] The matter was settled on 20 February 2020 in terms whereof the amount of R500 000.00 was reduced to R250 000.00. In terms of the settlement agreement, made an order of court, the respondent was ordered to account to the applicant and second defendant for all the respondent's dealings and transactions as agent of the applicant and the second defendant. Such accounting to include the basis of the dealings and transactions and the submission of such documents as the applicant deems appropriate.

[10] In their amended plea the applicant avers that, notwithstanding the order granted on 20 February 2020, the respondent have failed, refused or neglected to provide a proper statement of account to the applicant (and second defendant) to date, being 15 February 2022. Therefore, the applicant (and second defendant) deny that they owe any amount to the respondent. Reference is made to the fact that the applicant (and second defendant) have instituted action against the respondent under case no: 2021/46964 in the High Court of South Africa, Gauteng Local Division in respect of the

[1] Act 94 of 1990.

claim for payment of an amount which the respondent is indebted to the applicant (and the second defendant).

[11] An amendment to the initial plea followed as a result of an earlier exception. The notice of intention to amend the plea was delivered in the latter part of November 2021. The applicant's attorneys, although alluding to damages suffered by the applicant in the amended plea, omitted to include contractual claims for breach of the terms of the Loan and Finance Agreement and the Cession of Book Debts Agreement by the respondent. On 27 September 2022 the applicant formally requested the respondent's consent for the late filing of its intended counterclaim. No response or consent was forthcoming notwithstanding a further request and follow-up enquiry addressed to the respondent's attorney dated 3 October 2022.

[12] As a result the applicant launched the present application on 1 November 2022 for leave of this court to file its counterclaim. On 24 November 2022 the respondent delivered an answering affidavit in opposition thereto where after the applicant filed its replying affidavit on 15 December 2022.

[13] In order to succeed with the relief claimed the applicant must:

13.1 provide a reasonable and acceptable explanation for the lateness; and

13.2 show an entitlement to institute a counterclaim.[2]

[14] Rule 24(1) of the Rules, in terms of which the present application is brought, provides, in part, that:

> "A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage . . ."

[15] A medical doctor, Dr D P Pretorius, deposed to the affidavit in support of the application. Dr Pretorius is a director of the applicant. He explained that it is clear from the applicant's amended plea that it has suffered damages and therefore has a counterclaim, *inter alia,* due to the breach of the Loan and Finance Agreement by the respondent for not paying the consultancy fees for the last two months, being July and August 2019, of the termination period.

[2] See Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd 2012 (3) SA 143 (GSJ) at 146 [8].

[16] The applicant furthermore has a claim due to the respondent's breach of the Cession of Book Debts Agreement by not properly handing over the book debts to the defendant as at 31 August 2019 or crediting such amount to the loan account. It is stated under oath that the failure of the applicant's attorneys to include the contractual claims as specific counterclaims, was an unforeseen and unintentional error on their part.

[17] Subsequent to the judgment in the matter of **Dr L J Faul and Associates NO 14 Incorporated and others v Medicross Healthcare Group (Pty) Ltd** [3] the appellant's attorneys reconsidered the matter and concluded that it is, after all, in fact necessary to file specific counterclaims on behalf of the applicant. A copy of the judgment relied upon by the applicant is appended to the application.

[18] While drafting this application, and upon reconsideration of the agreements concluded between the applicant and the respondent, the applicant's attorneys furthermore realised that the applicant also has a counterclaim in terms of the Cession of Book Debts Agreement for breach of contract and/or damages.

[19] The respondent, in opposing the application, criticised the explanation proffered by the applicant as being wholly unsatisfactory. It is contended by the respondent that what is completely absent from the explanation is an express record of:

19.1 The instructions being issued by the applicant to the mandated attorney;

19.2 The date of such instruction;

19.3 An acceptance by the legal representative of the applicant of such instruction.

[20] Counsel on behalf of the respondent, Mr Posthumus, argued that the failure to properly explain the default is exasperated by the failure to attach a confirmatory affidavit by the applicant's attorney, Mrs P Lombard of Mashabane Liebenberg Sebola Inc., confirming that she had received instructions to institute such counterclaims. In essence the argument on behalf of the respondent is that the explanation proffered by the applicant lacked detail regarding the instructions to include a counterclaim and the only reason for this is, so the argument goes, because the instruction was never issued.

[21] On behalf of the respondent it is furthermore contended that the **Faul** judgment only deals with a claim for unpaid consultancy fees. The **Faul** judgment did not deal with claims in terms of the cession of book debts which forms the second contemplated

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[3] (28795/2019) [2022] ZAGPJHC 512 (8 August 2022).

claim by the applicant. Therefore, reliance upon the **Faul** judgment, which was delivered on 8 August 2022, does not avail the applicant of an explanation for the delay in delivering its counterclaim in respect of this particular claim.

[22] The applicant must, in addition to a proper explanation for its delay, demonstrate its entitlement to institute a claim. The respondent contends that, from the contents of the intended counterclaim attached to the founding affidavit, it is evident that the claims as advanced have become prescribed. In respect of claim A, based on the alleged unpaid consultancy fees, the applicant seeks to claim an amount of R 693 274.69 that has become due in July 2019 and August 2019. In respect of claim B, the applicant seeks payment sounding in money to the value of R238 165.22, emanating from a debt that was payable by 31 August 2019.

[23] The argument raised by the respondent is that the prescription period for both claims are a period of three years with the result that both these intended claims have become prescribed. A further argument relied upon by the respondent is that the amended plea contains a denial that the applicant entered into any written agreement with the plaintiff. However, in the intended counterclaim the applicant seeks to incorporate as part of their claims A and B, a reliance on the Loan and Finance Agreement whilst in paragraph 15 reliance is placed upon a tacit agreement between the parties. The further point relates to the fact that the intended counterclaims will be excipiable.

[24] In an instance where a plea is delivered without a counterclaim, a party seeking to introduce a counterclaim at a later stage needs consent of the plaintiff. If consent is refused, as in the matter at hand, the defendant may approach the court in terms of Rule 24(1) for leave to do so. The provisions of Rule 24 (1) make it clear that the court has a discretion to allow a counterclaim to be filed at a later stage. The exercise of the court's discretion may be guided by decisions as to the circumstances in which the courts should exercise their discretion in favour of allowing the amendment of pleadings or the upliftment of bar.[4]

[25] In **Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others**[5] the court dealt with an application by the defendant for leave to institute a claim in reconvention in terms of the provisions of Rule 24(2). In regard to the requirements to be satisfied in

[4] Metje & Ziegler Ltd v Stauch, Vorster & Partners 1972 (4) SA 679 (SWA).
[5] 1990 (1) SA 393 (W).

order to succeed the court held that it was necessary for the applicant to disclose its *locus standi* and further to disclose the cause or causes of action upon which the action against them would be based. To this the learned Judge added:

> "The need to establish a *prima facie* case of potential success in an action against the said persons does not enter the picture. A condition rendering entitlement to take action subject to success in the action seems absurd and would be misplaced in the context of Rule 24(2). Cf *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E) at 737G-738A. I do not think that the condition in Rule 24(2) must be construed in this way."

[26] In **Lethimvula Healthcare (PTY) LTD v Private Label Promotions (PTY) LTD**[6] Van Oosten J concluded that the same reasoning must apply to an application under Rule 24(1). The court confirmed that there are two criteria which must be met and held that the only grounds on which an application in terms of the provisions of Rule 24 (1) may be resisted would be if the intended counterclaim fails to comply with the provisions of Uniform Rules of Court 18 and 20.[7]

[27] In **Lethimvula Healthcare** the court held that it is not called upon to make a determination relevant to the merits of the counterclaim without having the benefit of oral evidence, as this would result in a premature determination of the issues.[8] Once the intended counterclaim has been filed it remains open to the plaintiff, in terms of the rules of court, should it wish to do so, to address such causes of complaint as there may be.

[28] In the matter of **Union Finance Holdings (Pty) Ltd v Bonugli NO and Another**[9] the same bench as in the **Lithimvula** matter, considered whether a defendant had met the second criteria for the late delivery of a counter claim, namely the entitlement to institute the counter claim. The plaintiff had opposed the introduction of the defendant's counterclaim on the basis that same had become prescribed. Van Oosten J considered whether prescription can be raised in such proceedings, being interlocutory of nature. With reference to the matters of **Rand Staple- Machine Leasing (Pty) Ltd v ICI (SA) Ltd,**[10] **Grindrod (Pty) Ltd v Seaman**[11]and **Associated Paint & Chemical Industries**

[6] (Supra) at [9].
[7] Lethimvula (supra) at [11].
[8] Lethimvula (supra) at [11].
[9] [2012] JOL 29230 (GSJ).
[10] 1977 (3) SA 199 (W).
[11] 1998 (2) SA 347 (C).

(Pty) Ltd t/a Albestra Paint and Lacquers v Smit[12] the court held that the defence of prescription may be raised in interlocutory proceedings, either if it were common cause, or in situations where the claim or right to claim were 'known to have prescribed'[13] .

[29] Mrs Sander, counsel on behalf of the applicant, argued that it has to be kept in mind that the contractual terms on which the defendant in the **Union Finance Holdings** matter premised its counterclaims are different to those on which the applicant, in the matter at hand, has based its intended claims. Consequently, whether the contractual obligations form a bilateral agreement are in truth and in fact reciprocal in nature and thereby struck by the provisions of section 13(2) of the Prescription Act[14] will be a matter of contractual interpretation on a case by case basis.

[30] Furthermore, for reciprocity to exist the obligations of one party must be undertaken in exchange for the obligation of the other party to be performed but, as confirmed by the Appellate Division in **Rich and Others v Lagerwey:**[15]

> "Whether 'such a relationship' does exist, will depend on the terms of the particular contract under consideration ... common sense would seem to indicate that inter-dependent promises are *prima facie* reciprocal, unless a contrary intention clearly appears from consideration of the terms thereof."

[31] The dispute between the parties, as is evident from the particulars of claim and amended plea, relevant to the conclusion of the agreements, pertains to the date of conclusion and the identity of the contracting parties. The terms of the agreements relied upon by the parties are for the most part identical. In contracts which create rights and obligations on each other, it is basically a question of interpretation whether the obligations are so closely connected that the principle of reciprocity applies.[16]

[32] When a contract is bilateral the obligations on the two contracting parties are *prima facie* reciprocal unless the contrary intention clearly appears from consideration for the terms of the contract.[17] Reciprocity of debt in law does not exist merely because

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[12] 2000 (2) SA 789 (SCA) at para 9.
[13] Stroud v Steel Engineering Co Ltd and Another 1996 (4) SA 1139 (W) at 1142.
[14] Act 68 of 1969.
[15] 1974 (4) SA 748 (AD) at 761H-762A.
[16] B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 341 (A) at 418
[17] Grand Mines (Pty) Limited v Giddey NO 1999 (1) SA 960 (SCA) at 971 C-D (Minority judgment of Schutz JA not in conflict with the majority on this point).

obligations which are claimed to be reciprocal arise from the same contract and each party is indebted in some way to the other party. An evaluation and more immediate correlation than that is required. The overriding consideration is the intention of the parties and the question whether the performance of respective obligations was reciprocal.

[33] I am satisfied that, at least *prima facie,* the obligations of the parties are reciprocal and therefore the applicant is entitled to invoke the provisions of section 13(2) of the Prescription Act. The court in the **Lethimvula Health Care** matter also held that the applicant is not required to establish a more onerous requirement in order to succeed in an instance where he seeks leave from the court to allow introducing a counterclaim subsequent to the delivery of a plea. At this stage the court is not called up to make a determination relevant to the merits of the counterclaim without having had the benefit of oral evidence. The applicant is not obliged to show that there is a prospect of success in the action for him to be entitled to institute a counterclaim.[18]

[34] From the contents of the draft order made by agreement between the parties in case no: 3971/ 2019, a date and time mutually convenient to the parties for the purpose of a debatement of the accounting delivered by the respondent was to take place. It is therefore evident that, already on 20 February 2020, it had been envisaged that the respondent, subsequent to accounting to the applicant and proper debatement, might be liable for repayment to the applicant.

[35] On behalf of the respondent it was furthermore argued that Mrs Lombard actually premised her request on the outcome of the **Faul** matter and therefore the contention that the attorney omitted to institute such counterclaims is clearly false. Furthermore, the same attorneys represented one of the parties in the **Faul** matter. To my mind the contents of the draft order dated 20 February 2020 indicates that a counterclaim had been envisaged and lends support for the contention that the attorney omitted to institute the same. The court in general are ordinarily reluctant to penalise a litigant on account of his attorneys' negligence or errors.[19]

[36] Insofar as the respondent rely upon the "once- and- for- all" rule, also this objection may be dealt with either in the action proceedings in the Gauteng High Court or at a

[18] Wigget v Wannenburgs 2022 JOL 54178 (GP).
[19] Reinecke v Incorporated General Insurance Ltd 1974 (2) SA 84 (A) at 92K-H.

later stage during the main action and following the filing of the applicant's intended counterclaim. The respondent will suffer no prejudice if leave is granted to the applicant to file its counterclaim. The respondent will not lose its procedural and substantive rights in terms of the court rules. On the other hand, the applicant stands to be prejudiced if the application is refused.

[37] In the exercise of my discretion and for the reasons stated together with the consideration of justice, equity and convenience, I am of the view that I should exercise my discretion in favour of the applicant and therefore leave should be granted to the applicant to introduce its counterclaim in terms of Rule 24(1)

[38] The applicant argued that it was put under trouble and expenses to proceed with this application as a result of the respondent failing to grant such permission. Although the applicant is successful in obtaining the relief claimed herein, the customary rule that a litigant requesting an indulgence should pay the costs, apply in *casu*. The only exception would be if the respondent's opposition to the application was unreasonable. Having regard to the arguments raised by the respondent herein, I cannot fault the respondent for opposing the application and therefore the customary cost order will follow.

[39] **ORDER:**

The following order is issued;

1. The Applicant/First Defendant's non-compliance with the provisions of Rule 22(1) is hereby condoned.
2. Condonation for the late filing of the Applicant/First Defendant's counterclaims (claims in reconvention) is granted
3. The Applicant/First Defendant is granted leave to file its counterclaims within 10 days from the date of this order.
4. The Applicant is ordered to pay the costs of the application.

[redacted]

I VAN RHYN J

On behalf of the Applicant:	**ADV. I SANDER**
Instructed by:	ROSENDORFF REITZ BARRY ATTORNEYS BLOEMFONTEIN
On behalf of the Respondent:	**ADV. I L POSTHUMUS**
Instructed by:	ALBERTS ATTORNEYS INC. BLOEMFONTEIN