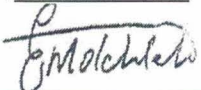




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2021/21595

1.	REPORTABLE: Not
2.	OF INTEREST TO OTHER JUDGES:
3.	REVISED.
7 November 2022	
	
signature	

In the matter between:

ACDC DYNAMICS (PTY) LTD

Plaintiff

and

SHRINIK RETAILING (PTY) LTD

t/a ACDC EXPRESS MIDRAND

First Defendant

INBENATHAN JAYASEELAN

GOVENDER

Second Defendant

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform.

The date for hand-down is deemed to be 7 November 2022.

Summary: Application to amend counter claim by the defendant. The principles governing amendment of pleadings restated. The applicant filed the first

counter application against the respondent's claim on the grounds that the respondent contravened sections 41, 42 and 48 of the Consumer Protection Act. The applicant sought to amend the counter claim following the exception raised by the respondent. It now seeks to amend that counter claim by substituting it with an amendment based on the alleged unjustified enrichment of the respondent alternatively fraudulent or negligent misrepresentation by the respondent. The respondent had instituted action against the applicant based on breach of the credit agreement between the parties. The respondent's action is based on demand for payment of goods sold and delivered to the applicant. The respondent objected to the proposed amendment on the grounds that the amendment is excepiable, vague and embarrassing.

JUDGEMENT

MOLAHLEHI J

Introduction

[1] The applicant in this application seeks an order authorising it to amend its counterclaim. The applicant, Shrinik Retailing (Pty) Ltd is the defendant in the main action instituted by the respondent, ACDC Dynamics (Pty) Ltd, the plaintiff in the main action.

[2] The applicant had earlier applied to amend its counterclaim, which it now seeks to substitute for the present application. The respondent opposes the application.

Background facts

[3] The summons in the main action was served on the applicant on 3 May 2021. Following the service of the summons, the applicant and the second defendant served their first counterclaim (the first amendment).

[4] In the first counterclaim, the applicant prayed for a declaratory order and payment of compensation on the grounds of contravention of sections 40, 41, and 48 of the Consumer Protection Act, 68 of 2008 (CPA).

[5] The applicant filed its notice to amend to the first counterclaim following the exception by the respondent on 20 October 2021.

[6] In the present application (the second amendment) the applicant seeks to amend the first amendment of the counterclaim by deleting that amendment and substituting it with the present application.

[7] The present amendment is based upon the alleged unjust enrichment of the respondent, alternatively, fraudulent or negligent misrepresentation by the respondent.

[8] The respondent's action against the applicant is based on a credit facility granted to the applicant in December 2015. In terms of the agreement, the respondent undertook to supply the applicant with certain goods subject to the applicant effecting payment of the same within thirty days of the delivery of the goods.

[9] The respondent alleges in the particulars of claim that it delivered the goods to the applicant in terms of the agreement during November 2020 but that the applicant has failed to honour its obligation of effecting payment. As a result, the respondent claims payment in the sum of R2 860 958.79.

[10] The applicant's case is based on its alleged impoverishment and enrichment of the respondent, consequent the payment in the sum of R31 270 296.76 to the respondent. Its alternative claim is based on alleged fraudulent or negligent misrepresentation made by the respondent. It is alleged in this regard that the applicant was induced by the representation made by the respondent to order goods from the respondent at a higher price. In other words, but for the misrepresentation and reliance thereon, the applicant could have acquired the same goods from other wholesalers. The applicant further contends that it was not bound to purchase the goods from the respondent and that the price was excessive.

[11] The respondent has raised six grounds of objection to the proposed amendment and they are as follows:

“20.1 Ground 1: the Respondent alleges that the applicant's proposed counterclaim based on enrichment is excipiable as the respondent supplied products to the applicant against the payment of the sum of R31270296.76, and the respondent was therefore not enriched at the applicant's expense as alleged;

- 20.2 Ground 2: the respondent alleges that paragraphs 12 and 14 of the applicant's proposed counterclaim if effected, would not disclose a cause of action, alternatively, would be vague and/or embarrassing by failing to plead how and on what basis the respondent was unjustifiably enriched at the expense of the applicant;
- 20.3 Ground 3: the respondent alleges that paragraph 10 of the applicant's proposed counterclaim, if effected, would be irregular and/or vague and with the manner in which the alleged average gross profit percentage has been calculated, and further lacks particularity relating to other wholesalers and their prices, as well the calculation of the amount allegedly overcharged. embarrassing for failing to plead the manner in which the applicant had transferred the purported payment of the respondent's invoices and the account to which the amount was transferred;
- 20.4 Ground 4: the respondent alleges that paragraph 18 of the applicant's proposed counterclaim if effected, would be irregular and/or vague and embarrassing for want of alleging that the respondent's representatives were duly authorized to make the alleged representations and by not pleading whether the alleged representations were made orally or in writing;
- 20.5 Ground 5: the respondent alleges that paragraph 21 of the applicant's proposed amendment of its counterclaim if effected, would be irregular and/or vague and embarrassing by not alleging the basis and specifications of the fair value and/or market prices of the products, as well as the identity of other wholesalers and/or the prices such wholesalers would have charged for identical products;
- 20.6 Ground 6: the respondent alleges that paragraphs 24, 25 and 26 of the applicant's proposed counterclaim, if effected, would be irregular and/or vague and embarrassing as it fails to deal with the manner in which the alleged average gross profit percentage has been calculated, and further lacks

particularity relating to other wholesalers and their prices, as well the calculation of the amount allegedly overcharged."

The legal principles

[12] The general principles governing an amendment of pleadings are set out in rule 28 of the Uniform Rules of Court.¹ (the Rules). It is trite that where there is no objection to the proposed amendment same may be effected without the need to approach the court. However, where the other party objects to the amendment, the applicant would have to approach the court and obtain leave to amend. The general and sensible approach that is usually adopted by the courts is to grant the amendment and avoid

¹ Rule 28 Rule provides as follows : "Amendments to pleadings and documents

- (1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).
- (6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.
- (7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
- (8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.
- (9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.
- (10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit."

an overly technical approach in dealing with such applications.² The court may refuse to grant an amendment where the proposed amendment is excepiable.³

[13] The principles relating to exceptions were explained in *Living Hands (Pty) Ltd and Another v Ditz and Others*,⁴ as follows:

- "(a) . . . the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
- (b) The object of exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs.
- (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties.
- (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
- (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
- (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

² See *Telematics, the Advertising Standards Authority South African* 2006 (1) SA 461 (SCA).

³ *Check Krischke v The Road Accident Fund* 2004 (4) SA. The 358 (W) at 363.

⁴ (42728/2012) [2012] ZAGPJHC 218; 2013 (2) SA 368 (GSJ) (11 September 2012)

- (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."

[14] The other aspect of the general approach adopted by the courts is that an amendment will not be granted if the opposing party is prejudiced or if the amendment is *mala fide*. The respondent may be prejudice where amongst others the proposed amendment is vague and embarrassing.

[15] In *Van Zyl N.O and Another v Smit*,⁵ the court, in dealing with the issue of vague and embarrassing averments, held that:

"An exception that a pleading is vague or embarrassing will not be upheld unless the excipient will be seriously prejudiced. The excipient has a duty to persuade the court that the pleading is excipiable on any interpretation that can be attached to it. An exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action: it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing. Such an exception strikes at the formulation of the cause of action and not it's legal validity. An exception that the pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. The court has to consider as a test for vagueness whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced."

⁵ 41425/2020) [2021] ZAGPPHC 499 (5 August 2021).

[16] In the present application, the respondent has objected to the amendment on the grounds that the cause of action pleaded by the applicant is vague and embarrassing. The principles governing an exception based on an averment that the cause of action is vague and embarrassing are well established in our law. The test on exceptions was formulated as follows in *Southernport Developments (Pty) Ltd v Transnet LTD*.⁶

- "1. In order for an exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it.
2. A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation.
- 3 The Court should not look at a pleading with a magnifying glass of too high power.
- 4 The pleadings must be read as a whole; no paragraph can be read in isolation. in order to succeed with an exception, the excipient needs to satisfy the court that it would be seriously prejudiced in the event that the exception should not be upheld."

The parties' submissions.

[17] The applicant contends that all the six grounds upon which the respondent based its objections are technical and inconsistent with the principles of law discussed above. It was further argued on behalf of the applicant that even if certain necessary allegations may have been left out in the cause of action in the counterclaim, that is not dispositive of the case because the respondent may still be able to plead to the claim.

⁶ 2003(5) SA 665 (W).

[18] The applicant argued in relation to grounds 1, 2, 3 and 4 of the objections that the respondent failed to discharge its duty of showing that, upon every interpretation of the counterclaim, discloses no cause of action.

[19] Relying on the decision in *Jowell v Bramwell-Jones and Others*,⁷ in relation to grounds 3 and 6, the applicant contends that the lack of particular averments complained of by the respondent can be cured through either discovery or requests for further particulars.

[20] On the other hand, the respondent contends that the second proposed amendment fails to disclose the cause of action and that the allegations contained in the cause of action are vague and embarrassing.

Evaluation

[21] The applicant's case, particularly in paragraph 20 of its heads of argument, is based on *conditio indebiti* with the view to recovering what is referred to as "monies paid under an unenforceable contract."

[22] It is apparent from the earlier discussion that grounds 1 and 2 of the respondent's objections relate to the issue of whether the proposed amendment discloses a cause of action. This will be dealt with in more detail later in this judgment.

⁷ (543/97) [2000] ZASCA 16; 2000 (3) SA 274 (SCA); [2000] 2 All SA 161 (A) (28 March 2000).

[23] It is not in dispute that the respondent supplied the applicant with goods against the payment of R31 270 296.76. The payment was made in the context of a credit agreement, which had been concluded between the two parties.

[24] In the proposed amendment, the applicant seeks to avoid any contractual obligation on the ground that the payment was made in error. The allegation in this regard is set out in paragraph 11 of the counterclaim as follows:

"The payment by the first defendant to the plaintiff of the total sum of R31 270 296,76 was not due and was made in error, i.e. it took place without valid legal grounds for any such payment obligation, as the supply agreement never took effect and remained in operative."

[25] The applicant accepts in paragraph 12 of the proposed amendment that the payment was made pursuant to the said agreement. It contends that the payment was made with a *bona fide* but mistaken belief that it was legally obliged to make the payment of the said amount. The allegation made in this regard is that:

"The said payments were effected in reliance upon a putative agreement and motivated by the *bona fide* but mistaken belief that the first defendant (the applicant) was legally obliged to make payment of the amounts reflected in the plaintiff's invoices, calculated at the plaintiff's prices, and that those amounts were in fact owing."

[26] It seems to me that the *conditio indebiti* may, in all probabilities have been sustainable in favour of the applicant had it persisted with the first counterclaim because in that case, the contention was that there was noncompliance with the formalities prescribed by the CPA. Of course, this would also have depended on whether there was proof of the contravention of the CPA. That is different in the

present application. To emphasize, at the risk of being repetitive, the payment in the present matter was made in exchange of the goods supplied in terms of a credit agreement.

[27] I am also in agreement with the respondent in relation to the issue of misrepresentation. The averments made are vague and embarrassing. In this respect, the applicant alleges that "the plaintiff represented by Mario Maio and Ricardo Maio and "other representatives," made the misrepresentation upon which it relied on in concluding the agreement. The proposed amendment provides no details as to who "the other representatives," are who represented the respondent.

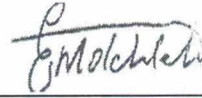
[28] The applicant's proposed amendment lacks particularity and details concerning the "cost of sales", and the identity of the wholesaler suppliers referred to in the proposed amendments to assist the respondent in making a comparison of the quality of the goods supplied by those other suppliers.

[29] In light of the above, the applicant's application stands to fail. Furthermore, the application stands to fail because the applicant has been unable to show the existence of exceptional circumstances supporting the granting of the amendment.

Order

[30] In the circumstances the following order is made:

1. The applicant's application to amend the counterclaim is dismissed.
2. The applicant is to pay cost of this application on the scale as between attorney and client.



E MOLAHLEHI

Judge of the High Court of
South Africa, Gauteng Local
Division, Johannesburg

Representation

For the Applicant: Adv D Moodliyer

Instructed by: D' Amico Incorporated

For the respondent: Adv. Dean Van Niekerk

Instructed by: Cliffe Dekker Hofmeyer Inc.

Hearing date: 1 August 2022

Delivered: 7 November 2022.
