

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 5031/2018

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

ASA METALS (PTY) LTD (IN BUSINESS RESCUE

PLAINTIFF

And

VARDOCAP

DEFENDANT

JUDGEMENT

KGANYAGO J

[1] The plaintiff had initially launched a liquidation application against the defendant. The matter came before me in the opposed motion wherein I

dismissed the plaintiff's liquidation application on the basis that there was a material dispute of fact in which the matter could not have been decided on papers. The plaintiff proceeded to issue summons against the defendant. On receipt of the summons, the defendant entered an appearance to defend. On receipt of the defendant's appearance to defend, the plaintiff applied for summary judgment against the defendant. The court refused the plaintiff's summary judgment application and the defendant was granted leave to defend the plaintiff's action.

[2] The defendant filed a Rule 23(1) notice against the plaintiff's particulars of claim on the basis that they are vague and embarrassing, alternatively renders the pleading not to sustain a cause of action. The plaintiff proceeded to amend its particulars of claim, and thereafter the defendant filed its plea and counterclaim. The plaintiff thereafter filed a Rule 23 and 30 notice in terms of which the plaintiff notified the defendant that it intends to make an application to have the defendant's plea and counterclaim set aside in accordance with Rule 30, on the grounds that it constitutes an irregular step, in that the defendant has not complied with the provisions of Rule 18(4), 18(6) and 18(10) of the Uniform Rules of Court. In the alternative the plaintiff was excepting to the defendant's plea and counterclaim in accordance with the provisions of Rule 23 on the grounds that the allegations contained in the defendant's plea and counterclaim failed to disclose a defence and/or cause of action, alternatively, are vague and embarrassing.

[3] The defendant in reply to the plaintiff's Rule 30 notice stated that the plaintiff's Rule 30 notice was filed out of the prescribed time period as provided for in terms of Rule 30(2)(b). With regard to the plaintiff's notice of exception, the

defendant gave the plaintiff its notice of intention to amend its plea and counterclaim. The plaintiff filed an objection to the defendant's intention to amend on the basis that the intended amendment do not remove the causes of complaint and thus the plea and counterclaim remain excipiable and should be set aside.

[4] The plaintiff in its amended particulars of claim has stated that on or about 9th December 2016 and at Mokopane the plaintiff and defendant, both duly represented, concluded a partly written, partly oral agreement in terms of which the plaintiff sold sasol green pitch coke to the defendant for R840 000.00 excluding VAT. It is common cause that the defendant never signed the written agreement. The plaintiff in its particulars of claim has further stated that the defendant, had agreed that no warranties or representations have been given or made as to the state, condition or fitness of the sasol green pitch coke which it takes with all faults and agrees to accept all risks of whatsoever nature.

[5] The defendant in its plea admitted that on or about December 2016, and at Mokopane, the parties entered into an oral agreement in regard to the defendant purchasing sasol green pitch coke from plaintiff in accordance with the sale agreement attached to the plaintiff's particulars of claim. The defendant further pleaded that plaintiff through its representatives, indicated that they have done prior testing on the product, and that it would fit within the defendant's required parameters, as further agreed, to the extent that it should contain phosphate levels of 0,001 and sulphur of around 0,2 with high carbon and low ash as per specifications provided by plaintiff to defendant at

the time. The defendant has also filed a counterclaim for damages it allegedly suffered as a result of the plaintiff's alleged material non-performance.

[6] In its exception to the defendant's plea, the plaintiff has stated that the defendant in its plea relies on certain representations made by the plaintiff's representatives at the time of the conclusion of the agreement which are prior to testing done on the products; the fit of the product within the defendant's parameters as further agreed; and the extent of the phosphate, sulphur and carbon levels within the product. According to the plaintiff, the representations alleged by the defendant in its plea are in direct conflict with the admitted written part of the agreement. Further that the defendant had pleaded an oral agreement without pleading in accordance with Rule 18(6) by stating when the agreement was concluded, and who represented each party. Further that the oral agreement and conclusions pleaded by the defendant amounts to a variation of the written part of the agreement. Further that the allegation that the product as rendered by plaintiff was defective in terms of the initial agreement is in conflict with the admitted written part of the agreement.

[7] With regard to the defendant's counterclaim, the plaintiff in its exception has stated that ad paragraph 1 does not comply with Rule 18(6), and it is also unclear as to which terms the defendant relies on in reconvention. Further that the averments made by the defendant in its counterclaim are inconsistent with the admitted part of the agreement, and also do not contain the requisite particularity as required in terms of Rule 18(6).

[8] In response to the plaintiff's notice of exception, the defendant filed its notice of intention to amend its plea and counterclaim. The defendant pleaded further that sasol green pitch coke as described in the written agreement

pleaded by the plaintiff is a material that should have phosphate levels of 0.001, sulphur content of around 0.2, with high carbon and low ash. Further that the plaintiff failed to deliver material to the defendant that meet the requirements, as stated, of sasol green pitch coke and the performance by plaintiff was thus materially defective.

[9] The defendant also substituted paragraph 8.7 of its plea by stating that at the time of delivery of material on or about February 2017, the defendant through its authorised representative, Mr Piere Peens, orally agreed with Mr Gerhard Terblanche, duly authorised to act on behalf of plaintiff, alternatively purporting to be so duly authorised, that payment will be held back and conditional upon and until customers are satisfied with the tests and the defendant had ensured that the material provided by the plaintiff can be used in future, alternatively qualifies as 'sasol green coke'. The defendant further stated that this was after it was established that the phosphate levels were more than the specification, alternatively higher than that expected of sasol green pitch coke. It is also on this conditional basis that delivery of the material from plaintiff was accepted. That it was also apparent that plaintiff wanted to get rid of the product at all cost.

[10] With regard to the counterclaim, the defendant substituted paragraph 5 of its counterclaim by stating that it was within the contemplation of the parties at the time of the conclusion of the initial agreement, alternatively the oral agreement, all pleaded above, that defendant would suffer certain consequential damages in the event that the material delivered was materially defective. The defendant also inserted a paragraph making a breakdown of the alleged damages it had suffered as result of Samancor, the defendant's

client rejecting 2500 tons which were materially defective in that it did not qualify as sasol green pitch coke, even though it took the defendant six weeks to produce that at its factory.

[11] On receipt of the defendant's notice of intention to amend, the plaintiff filed its objection to the defendant's notice of intention to amend. The grounds of objection are that the defendant's intended amendment do not remove the cause of complaint and that the plea remained excipiable; that the defendant's intended amendment in its plea amounts to an oral agreement, and that such oral agreement remains precluded by the admitted part of the agreement, and as such does not remove the cause of complaint, and the plea remains excipiable. Further that the defendant's responses do not address the complaint that the plea is in conflict with the admitted written part of the agreement, and as such does not remove the cause of complaint and the plea remains excipiable.

[12] The defendant on receipt of the plaintiff's objection has filed a substantive application for leave to amend and that the plaintiff's exception be dismissed. The plaintiff is opposing the defendant's application for leave to amend. Both the exception and application for leave to amend were agued simultaneously. The parties agreed that the exception should be dealt with first, and that if the exception is not upheld, the amendment will be granted.

[13] An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. (See *Trope and Others v South African Reserve Bank*¹). The court cannot uphold an exception on the ground that it is vague and embarrassing and set aside the

¹ 1993 (3) SA 264 (A) at 269I

summons unless the exception goes to the root of the action. (See *SA Motor Industry Association v SA Bank of Athens*²). In order to succeed, an excipient has a duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed, failing which the exception ought not to be upheld.

[14] Rule 18(4) of the Rules read as follows:

“Every pleading shall contain a clear and concise statement of the 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.”

[15] It is trite that an amendment will not be allowed in circumstances which will cause the other party such prejudice which cannot be cured by a costs order or a postponement. In *Affordable Medicines Trust v Minister of Health*³ Ngcobo J said:

“The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed...The question in each case, therefore, is, what do interest of justice demand?”

[16] A party who raises an exception will be complaining about the defect in the pleading and notifying the other party to cure that defect. In the case at hand the plaintiff had notified the defendant to cure the defect in its plea and

² 1980 (3) SA 91 (A)

³ 2006 (3) SA 247 (CC) at para 9

counterclaim. The defendant filed a notice of intention to amend in trying to cure the defects the plaintiff is complaining about. However, it is the plaintiff's contention that the defendant's intended amendment does not cure the defects it is complaining about, but still render its plea and counterclaim excipiable, and therefore objecting to the intended amendment. I am called upon to determine whether the intended amendment is excipiable and therefore should not be allowed.

[17] The plaintiff's first complaint is that the defendant had admitted the written part of the agreement, whilst at the same time pleading certain representation made by the plaintiff at the time of the conclusion of the agreement. It is the plaintiff's contention that the defendant in pleading "representation" is in direct conflict with the admitted written part of the agreement. The defendant in trying to cure that complaint had substituted certain words like adding "fraudulently misrepresented" and "implicitly". Further, the defendant added a new paragraph that explains that there were alleged agreed specifications in regard to the material to be delivered by the plaintiff and also qualifying what it had stated in the preceding paragraphs.

[18] The plaintiff in its amended particulars of claim had pleaded that there was a difference in the %P analysis than what was agreed upon in terms of the sale agreement, and further that there were email discussions between the two parties which ultimately led to the parties agreeing on a reduced price. The defendant's intended amendment sought to address this issue and put it in more clearer. The manner in which the defendant sought to address the plaintiff's complaint, cannot be said that it renders its plea excipiable.

[19] Regarding the second complaint, the plaintiff has stated that the defendant had pleaded an oral agreement, but has failed to plead in accordance with Rule 18(6) in that the defendant has failed to state when the agreement was concluded and also who represented the parties. Further that the defendant had failed to plead that whoever represented the plaintiff had requisite authority to conclude such oral agreement on behalf of plaintiff. The defendant in its intended amendment had substituted the entire paragraph and put it in a clearer perspective. In that new paragraph, the defendant has stated that the defendant was represented by its authorised representative Mr Piere Peens, whilst the plaintiff was duly represented by its authorised representative Mr Gerhard Terblanche, alternatively Terblanche was purporting to be authorised. This in my view, addresses the plaintiff's complaint and cannot be said that it renders the defendant's plea excipiable.

[20] The plaintiff's third complaint to the defendant's plea is that the oral agreement and conclusions pleaded in defendant's plea amounts to variation of the written part of the agreement. The defendant in its intended amendment has stated that it did not sign the written agreement and therefore it is not barred in the manner in which it had pleaded, and further that the intended amendment provide for necessary arrangements per further agreement. The plaintiff in its amended particulars of claim, has pleaded that further email representations were made that culminated into a further agreement. That further agreement was never reduced to writing. The plaintiff itself relies on a partly written and partly oral agreement. Since the plaintiff is relying on a partly oral agreement, that opens the door to the defendant to state the terms of the alleged partly oral agreement which it feels that it has been left out by the plaintiff. As to which is the correct version, will be tested when evidence is

led during trial. It can therefore not be said that the manner in which the defendant had pleaded on this issue renders its plea to be excipiable.

[21] With regard to the fourth complaint, the plaintiff has stated that the allegations by the defendant that “the product as rendered by the plaintiff was materially defective in terms of the initial agreement”, whilst the at the same time the defendant is alleging a further oral agreement, are in conflict with the admitted terms of the part of the written agreement. The plaintiff in its amended particulars of claim has pleaded that there was a difference in the %P analysis than what was agreed upon in terms of the sale agreement. However, the plaintiff did not state what might have caused the difference. The defendant alleges that the plaintiff’s product was materially defective. What the defendant alleges, comes from the plaintiff’s pleadings, and whether that difference was as a result of a material defect or something else, is an issue that will be properly ventilated when evidence is led during trial, and it can therefore not prejudice the plaintiff.

[22] With regard to the defendant’s use of the word “further oral agreement”, from the plaintiff’s pleadings, it seems more than one oral agreement was reached. The first oral agreement was addressing the issue of a difference in the %P, and the second one was the discussions about payment. Whether indeed there was more than one oral agreement, can be cured during trial when evidence is led, and that will in no way prejudice the plaintiff.

[23] Turning to the plaintiff’s complaint that the defendant’s counterclaim does not comply with the provisions of Rule 18(6); are inconsistent with the admitted part of the agreement; and that the defendant’s averments in its plea does not comply with Rule 18(10). The defendant in its intended amendment has given

the basis upon which the plaintiff is allegedly liable for the damages it allegedly suffered and also a breakdown of its alleged damages. What the defendant has stated in its intended amendment contains clear and concise statements of facts upon which its claim is based. All these will not prejudice the plaintiff in pleading to the defendant's allegations.

[24] In my view, the defendant's intended amendment, addresses the issues raised by the plaintiff in its notice of exception. It can therefore, not be said that upon every interpretation of the plea and counterclaim, no defence and cause of action has been disclosed. Therefore, there is no merit in the plaintiff's exception, and it stand to be dismissed. In my view, the defendant's intended amendment is not made in bad faith or will cause injustice to the plaintiff, but has been triggered by the plaintiff's complaints. The intended amendment does not render the pleadings excipiable, and therefore stand to be allowed.

[25] It is trite that the awarding of costs is within the discretion of the court. The court must exercise that discretion judicially upon consideration of the relevant facts of each case. The general rule is that costs follow the suite. I do not find any reason why costs should not be awarded against the plaintiff.

[26] In result I make the following order:

26.1 The plaintiff's exception is dismissed with costs

26.2 Leave is granted to the defendant to amend its plea and counterclaim within fifteen days of this order in terms of its notice of amendment.

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the plaintiff	: Badenhorst WJJ
Instructed by	: Hogan Lovells (SA) Inc
Counsel for the defendant	: Adv Roos WJ
Instructed by	: Herman Potgieter Attorneys
Date heard	: 16th September 2021
Electronically delivered on	: 19th October 2021