

Reportable:	YES / ☒ NO
Circulate to Judges:	YES / ☒ NO
Circulate to Regional Magistrates:	YES / ☒ NO
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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **1193/2020**

Date Heard: **22/10/2021**

Date Delivered: **05/11/2021**

In the matter between:

DESERT OIL (PTY) LTD

Plaintiff/Respondent

and

**GRIEKWALAND WES KORPORATIEF BPK
t/a VAALRIVIER DIENSTASIE**

Defendant/Applicant

JUDGMENT

O'BRIEN AJ

1. This is an application in terms of Rule 28(4) to amend the defendant's plea and counterclaim. I shall refer to the parties as cited in the summons.

2. The plaintiff is a supplier of fuel products. The defendant buys these products from the plaintiff and trades with it at Vaalrivier Dienstasie, Douglas.
3. On 22 July 2020, the plaintiff issued a summons against the defendant. The plaintiff's claim is based on an alleged contractual agreement.
4. On 14 October 2020, the defendant filed its plea and counterclaim.
5. On 2 November 2020, the plaintiff delivered its replication to the defendant's plea and plea to the defendant's counterclaim.
6. On 8 December 2020, the defendant filed a notice to amend its counterclaim and plea. The proposed amendment of its counterclaim introduced a new claim, the second counterclaim, based on an alleged oral sales agreement concluded at Douglas during or about February 2021.
7. The second counterclaim alleges Mr van der Berg and/or Mr M du Plessis and/or Mr V Viviers and/or Mr R Le Roux, all of whom were duly authorised thereto, represented the defendant, and the plaintiff was represented by a person and/or persons of unknown identity.
8. On 14 December 2020, the plaintiff delivered a notice of objection to the second counterclaim because it did not comply with Rule 18(6). It did not state who concluded the alleged oral contract on behalf of the plaintiff. Furthermore, the failure to state who acted on behalf of the plaintiff in the oral

agreement is vague and embarrassing in that the plaintiff could not plead thereto.

9. On 22 December 2020, the defendant withdrew its notice of intention to amend its counterclaim and plea.
10. On 23 February 2021, the defendant again delivered notices of intention to amend its plea and counterclaim. The proposed amendment which led to this application reads:

“At 10. During or about February 2012 and at Douglas, Northern Cape Province, the plaintiff and the defendant tacitly entered into an agreement.”

11. The contradiction is immediately apparent. Initially, the defendant sought to rely on an oral agreement but now seeks to rely on an alleged tacit agreement concluded by conduct.
12. On 8 March 2021, the plaintiff filed a notice of objection to the 23 February 2021 proposed amendment. It brought the application on notice, and the Plaintiff's attorney filed an affidavit.

13. The grounds of objection:

13.1 The lack of *bona fides* by the defendant;

13.2 Failing to comply with Rule 18(6);

13.3 The proposed amendment is vague and embarrassing.

Bona Fide

14. A court dealing with an application for an amendment of a pleading has broad discretion and is only limited by considerations of prejudice or injustice to an opponent.

15. In **Moolman v Estate Moolman 1927 CPD 27 at 29**:

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

16. Ms Davis, on behalf of the plaintiff, submitted that an applicant applying for leave to amend must show that he is *bona fide* and that the amendment raises a triable issue. She relied on **Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) at 640 H – 641 A**. **Trans-Drakensberg** was approved by the Supreme Court of Appeal in **Ciba-**

Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander 2002 (2) SA 447 (SCA) at para 34.

17. In **Trans-Drakensberg (supra)**, the court made it plain that a party who wishes to change or add to his pleadings must explain the reason and show *prima facie* that he has something deserving of consideration, a triable issue. A party cannot place on record an issue for which he has no supporting evidence, where evidence is required save in exceptional circumstances.
18. Mr Knoetze, acting for the defendant, relied on **Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd 1999 (1) SA 1153 (SECLD)** submitted that it is not a requirement of Rule 28(3) that a party seeking an amendment must explain in order to be successful with the proposed amendment. The plaintiff submitted that the defendant could not simply ignore the allegations in its affidavit.
19. I do not read **Squid Packers** as a blanket ban that an affidavit explaining the purpose of the amendment should not be filed. Nepgen J specifically stated it is only if an objection which complies with sub-rule 3 is delivered that an application for leave to amend would have to be lodged.
20. It is difficult to understand the contradiction between the withdrawn amendment and the proposed amendment. It cannot be reconciled, for in one instance, the defendant pleads an oral contract and later changes that to a tacit contract. The two are mutually exclusive. The reference to a tacit contract

deviates from the proposed oral contract. In these circumstances, one would expect the defendant to state the reasons for the turnabout that, it failed to do. By that, I do not mean to be understood that an affidavit should always accompany an objection in terms of Rule 28(3). It would defeat the purpose of the rule. However, in this instance, the deviation being material, I would have expected the defendant to explain the change of stance. As stated in *Trans-Drakensberg*, the defendant needs to explain the reason for the change and show that it has a triable issue deserving of consideration. The reliance on **Squid Packers** is, therefore is misplaced.

Rule 18(6)

21. A party relying on a contract is compelled to give information in precise terms. It shall state whether the contract is written or oral and when, where, and by whom it was concluded, and if the contract is written, a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.
22. In **Khunou & Others v M Fihrrer & Son (Pty) Ltd & Others 1982 (3) SA 353 (W)** at 355 F – 356 A it was said:

“The proper function of a court is to try disputes between litigants who have real grievances and so to see to it that justice is done. The rules of civil procedure exist in order to enable courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are

in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner.

Of course, the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover sometimes not appropriate to specific cases. Accordingly, the Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if needs be, the Rules of the Court, according to the circumstances. This power is enshrined in s43 of the Supreme Court Act 59 of 1959.”

23. The complaint by the plaintiff is that the reference to unknown individuals acting on behalf of the plaintiff in the proposed amendment does not comply with Rule 18(6). It refrains from mentioning the specific individuals the defendant contracted with and the specific conduct attributed to these unknown persons when the agreements were concluded.

24. Mr Knoetze submitted that there is no need to specify the specific individuals. He calls in aid **Shell South Africa v Bezuidenhout & Others 1978 (3) SA 981 (NPD) at 983 E – 985 D** and **Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC & Others 2002 (1) SA 822 SCA at paras [2] [3] and [4]**.

25. Ms Davis referred to **Roberts Construction Ltd v Dominion Earth-Works Ltd 1968 (3) SA 255 (A)** for the submission that it is implicit in Rule 18(6) that when reliance is placed on a tacit agreement, the parties need to be identified.
26. Mr. Knoetze's primary submission was that the defendant relies on the conduct of individuals over a period, and as such, no need for specificity is required.
27. The **Shell** and **Golden Fried Chicken** cases do not assist his argument. For in those cases, the parties who relied on a tacit contract were clearly identified. In this instance, the plaintiff's contracting parties are referred to as unknown persons.
28. In my judgment, the principle enunciated in **Roberts Construction** holds true. I am in respectful agreement with the Learned Judge where at p262 B-C he held:

"Another aspect of the latter must now be mentioned. Rule 18(6) does not in terms refer to the case where the contract relied upon is implied. It seems, however, a necessary corollary that a pleader could hardly avoid disclosure of the fact that he is relying upon an implied contract (My reading: tacit). Failure to state whether a contract is written or oral would naturally lead to disclosure of the reason, and describing when, where and by whom it was concluded would in many instances entail the setting out of the conduct relied upon."

29. In this matter, it is incumbent on the defendant, relying on a tacit agreement to set out the specific conduct accorded to the specific individuals. That would place the plaintiff in a position to plead because it will know who did what and when. Absent that, the plaintiff would manifestly be prejudiced, which cannot be cured by a cost order. Also, the plaintiff would not be able to investigate the claim. Stated differently, the plaintiff would be embarrassed.
30. I hold that on this ground, the defendant fails.

Vague and Embarrassing

31. The defendant contended that the contractual relationship between the parties spread over several years. As such, there were many communications between the parties. During these communications, the parties would have gained knowledge of the business transactions which would place the plaintiff in a position to plead. However, it was not stated what that knowledge entails which would place the plaintiff in a position to prepare properly for trial.
32. Much was made about the plaintiff, also relying on a tacit agreement. The short answer to this is that the defendant is surely within its rights to file an objection if so advised.
33. It is odd that the defendant who allegedly deals with millions of rands is not in a position to identify the persons it contracted with. Surely, there must be a bookkeeping system in place which would identify when orders were placed

with the plaintiff and the persons who would make good through delivery notes on those orders. It is strange that a business entity like the defendant would accept petroleum products on contract but would not know the identity of the persons who arranged for those deliveries.

34. In my judgment, the point is well taken that the proposed amended plea to the second counterclaim is vague and embarrassing.

Costs:

35. Normally, a party seeking an indulgence must pay the costs. The defendant argued that the real reason for the objection to the proposed amendment is the plaintiff wants to make money out of the defendant because the defendant wants to deal with a different entity named Total.

36. In reply regarding the costs, the defendant argued that the proposed objection by the plaintiff was frivolous.

37. For the reasons stated, the plaintiff was fully entitled to object to the proposed amendment. The objection was certainly not frivolous.

38. I make the following order:

38.1 The application for leave to amend the defendant's plea and counterclaim is refused with costs;

38.2 The defendant is given leave to amend its plea and counterclaim, if so advised, within 30 days of the date of this order.



S C O'BRIEN

ACTING JUDGE

On behalf of the plaintiff

Adv D Davis S.C.

Corbers Attorneys

Cape Town

On behalf of the defendant

Adv B Knoetze S.C.

Elliot Maris Attorneys

Kimberley