



**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

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

Case number: 2555/2016

In the matter between:

**LESOLE AGENCIES CC**

Plaintiff

And

**ESKOM**

Defendant

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**HEARD ON:** 24 AUGUST 2018

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**JUDGMENT BY:** MATHEBULA, J

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**DELIVERED ON:** 16 OCTOBER 2018

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- [1] This is an opposed application for leave to amend the particulars of claim. The applicant, Lesole Agencies CC, is a close corporation duly registered and incorporated in terms of the laws of the Republic based

in Riebeckstad, Welkom. The respondent, Eskom, is a parastatal company with limited having its with registered office at Megawatt Park, Sandton.

- [2] This matter serves before me pursuant to an order granted by my brother Mhlambi J upholding the exception in a well thought judgment delivered on 28 September 2017. In that judgment the plaintiff (applicant) was granted an opportunity to remove the cause of complaint within 15 (fifteen) days from the aforementioned date.
- [3] The proposed amendment of the particulars of claim is couched in the following terms”-

**“1.**

**By deleting the whole of paragraph 7 and substituting it by the following:**

**“7.**

**Thus, and on or about June 2014 and at Bloemfontein, the parties concluded a written agreement (subject to what the Plaintiff pleads in para 9 of this Particulars of Claim). Meschack Lesole duly represented the Plaintiff and a duly authorised representative acted for the Defendant. Alternatively, and in the event of the court for any reason finding that the party had not concluded a written agreement, then and in that case the Plaintiff pleads that the parties had concluded an oral agreement on the terms as set out in annexure “A” mutatis mutandis, most notably the parties had then not agreed to any non-variation clause as set out in the fourth unnumbered paragraph on page 3 of Part CI: Agreements and Contract Data. In the further alternative, the plaintiff pleads that the parties had concluded a party**

written, partly oral agreement once again in that event, without the non-variation clause as a term.”

**2.**

By deleting the last sentence of paragraph 12.7 which starts with the words “The parties did not” and in with a date “June 2014”.

**3.**

By incorporating the following as paragraphs 12.8 and 12.9:

**“12.8 The original works as set out in the scope of the works had to be performed within a period of 44 days.**

**12.9 The conditions of contract were otherwise as per the Standard MEC3 Engineering and Construction Short Contract (of June 2005)., appended as annexure C hereto”**

- [4] The essence of the objections to the proposed amendment is contained in page 27 of the papers before me. Paragraphs 1.2 and 1.3 reads as follows:-

**“1.2 The first exception raised by the Defendant to the Plaintiff’s Particulars of Claim (and upheld by the Honourable Court in terms of the judgment and reasons handed down for such judgment on the 28<sup>th</sup> of September 2017), was firstly premised on the issue that ANNEXURE “A” to the Plaintiff’s Particulars of Claim, prescribes and/or set out in detail, the manner and/or form of acceptance for such document to bring about and/or to constitute any form of agreement between the parties thereto and secondly, premised on the issue that the so-called variation clause excludes any party to such purported agreement, to rely**

on a tacit or implied acceptance of the agreement and/or tacit and/or implied and/or oral incorporation of terms to such agreement as averred by the Plaintiff in its Particulars of Claim in order to set up a cause of action therein against the Defendant.

- 1.3 Although the proposed amendment of the Plaintiff's Particulars of seeks to address the second issue and/or leg of the exception upheld by the Honourable Court in its judgment and reasons handed down for such judgment on 28<sup>th</sup> of September 2017, the Plaintiff's proposal amendment in no manner or way seeks to address the first leg and/or issue (and/or to remove the first complaint) on which the Defendant's first exception duly upheld by the Honourable Court, where premised."**

- [5] Mr Grobler, for the applicant, says that the respondent contends that if annexure "A" and its terms on the document has not been complied with, there can be no for the purposes of the notice or intention to amend no contract at all. This, he submitted, that it was incorrect that the respondent took the view that the parties could not conclude any other form of contract. He argued that the applicant had pleaded the facts (if proved at the trial) that gave rise to the conclusion of the contract. These facts may establish that parties concluded a written contract or a party written/oral contract or oral contact.
- [6] Mr Snyman, for the respondent, replied that the amendment was occasioned by the need to overcome the exception upheld by my brother Mhlambi J. He relied on and quoted extensively the aforementioned judgment. He pointed out that the applicant was seeking leave to amend paragraph 7 of the particulars of claim by relying on the written agreement excluding the non-variation clause

as set out on page 3 of CI headed “Agreements and Contract Data”. The written agreement was being introduced by way of reference. The remainder of the document constitutes the contract barring the non-variation clause. He referred to paragraph 9 of the particulars of claim not being amended in this regard. In his view the amendment fell short of addressing the issues that were raised in the judgment referred to above. As a result the application for leave to amend must be dismissed with costs.

- [7] The decision to grant or refuse an application to amend rests in the discretion of the court.<sup>1</sup> In his approval of the principles laid down in a number of cases, Ngcobo J wrote the following:-

**“The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a 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'. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?”<sup>2</sup>**

- [8] In this matter I am faced with two (2) diametrically opposed viewpoints. The argument of the respondent is that the written agreement is introduced by reference. As a result the applicant is not

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<sup>1</sup> *Caxton Ltd and Another v Reeve Forman Pty Ltd and another* 1990 (3) SA 547 (A) at 565G

<sup>2</sup> *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261 C-D

complying with the judgment of Mhlambi J. I do not find this argument sound. The proposed amendment does not seek to introduce a new cause of action. The respondent is clearly relying on the written agreement. In the alternative an oral agreement without the non-variation. In essence, what is pleaded is the facts that the will (if proved) give rise to the conclusion of the agreement. I find it unnecessary to decide on this aspect and that the trial court will determine it on the appropriate occasion. It is incorrect for the respondent to take the view that the parties could not have concluded any other form of contract. The fallacy of the argument that the proposed amendment will in any event be excipiable is that the proceedings before me do not deal with an exception. It will be in the interest of justice that all issues are eventually finally ventilated in this matter during the trial.

[9] It is important to note that the cause of action as pleaded in the initial particulars of claim was a claim based on contract. This has not changed in the proposed amendment and there can be no talk of a new cause of action being introduced by it. The applicant is in no way seeking to enforce a different right than the one as initially pleaded. To that extent I do not envisage any prejudice to be suffered by the respondent in this regard. The facts that has to be proved by the applicant in order to succeed with the claim are still the same.

[10] Therefore I make the following order:-

10.1 The applicant is granted leave to amend its particulars of claim on the terms as set out in its notice of intention to amend.

10.2 The applicant is authorized and ordered to effect the amendment within ten (10) days of this order.

10.3 The respondent is ordered to pay the costs of this application.

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**MATHEBULA, J**

On behalf of Plaintiff:

Instructed by:

Adv. S. Grobler

Peyper Attorneys

Bloemfontein

On behalf of Defendant:

Instructed by:

Adv. C. Snyman

Patshoane Henney Inc.

Bloemfontein