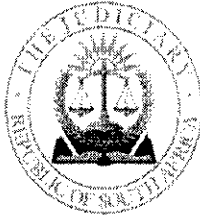


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 68257/2015

Date:

21/2/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

2017:02:21.....
DATE SIGNATURE

In the matter between:

F & J (PTY) LIMITED

PLAINTIFF

AND

INVEST IN PROPERTY 104 (PTY) LIMITED

FIRST DEFENDANT

VERDI SCHOLTEMEYER

SECOND DEFENDANT

JUDGMENT

TOLMAY, J:

INTRODUCTION:

- [1] The Plaintiff instituted action for damages against the Defendant during August 2015 for payment of an amount of R465 855-00 flowing from the first Defendant's alleged repudiation of an oral agreement between the parties alternatively a delict committed by the First Defendant.
- [2] The Defendants delivered their plea and counter-claim on 23 October 2015. On 13 November 2015 Plaintiff delivered a plea on the counter-claim.
- [3] On 18 November 2015 the Defendants delivered a notice of exception. The Plaintiff states that despite legal advice that the exception was mostly without merit, it was advised to amend its pleadings to avoid a protracted opposed exception hearing and the resultant costs. As a result the Plaintiff delivered a notice of amendment on 14 December 2015.
- [4] On 17 December 2015 Defendant filed an objection to the amendment which necessitated the bringing of this application.

CONDONATION:

[5] The application for leave to amend was filed out of time. The Defendants objected to condonation being granted. The application for leave to amend was filed 28 days late. The reason for the delay was that the notice of objection was filed on 17 December 2015 and Counsel for Plaintiff, who was briefed to attend to the drafting of the application, has already left for the recess period. Counsel returned on 11 January 2016 and e-mailed the draft application on 13 January 2016 to his attorney. Due to work pressure after the recess period the attorney only filed the papers on 4 February 2016. Although work pressure as such may not always be an acceptable excuse for a delay, I am of the view that in this instance the delay was not inordinate in the light of the fact that the festive period preceded it and furthermore and more importantly the Defendant did not show that it suffered any prejudice.

[6] As a result I exercise my discretion and condonation for the late filing of the application for leave to amend is granted.

THE MERITS:

[7] The Defendants' objection against the amendment of Plaintiff's plea is limited to par 2.15.1 and 2.16.2 of the notice of amendment. Paragraph 2.15.1 deals with par 16 of the Defendants' plea and par 2.16.2 deals with par 18 of the plea.

[8] Paragraph 16 of the Defendants' plea reads as follows:

"16.1 In terms of the provision of the Prospecting Agreement, the Prospecting Right, the EM Plan, the Draft Agreement and the legislation, Plaintiff was obliged to apply to the Department of Water Affairs (herein referred to as "DWAF") for a Water Use Licence in terms of the National Water Act, Act No. 36 of 1998 (as amended) for the Prospecting Area;

16.2 Plaintiff failed and/or neglected to apply for the Water Use Licence which rendered Plaintiff's prospecting activities and retrieval of diamonds in, on or under the Prospecting Area illegal in terms of the Prospecting Agreement, the Prospecting Right, the EM Plan, the Draft Agreement and the legislation and more in particular the Diamonds Act, Act No. 56 of 1986."

[9] Paragraph 2.15 of the notice of amendment reads as follows:

"2.15 Sonder om afbreuk te doen aan die voorafgaande, pleit die Eiser spesifiek soos volg op paragraaf 16 van die Verweerder se pleit:

2.15.1 "Dit word ontken dat die Eiser verplig was om aansoek te doen vir 'n water gebruiklisensie;

2.15.2 Dit word ontken dat die Eiser nie vir 'n water gebruiklisiensie aansoek gedoen het nie en Eiser verwys in hierdie verband na paragraaf 2.15.1 hierbo; en

*2.15.3 Die verdere bewerings in hierdie paragraaf vervat word
ontken as of spesifiek teengesprek."*

[10] In the notice of objection to the amendment the Defendants state as follows regarding par 2.15.1:

"4. Plaintiff has not denied that the Prospecting Right, the EM Plan and the Draft Agreement forms part of the Prospecting Agreement;

*5. **Ad sub-paragraph 2.15.1 of the Notice of amendment (re paragraph 16 of Defendants' Plea):***

In view of Plaintiff's admission of the content of the Prospecting right, the Draft Agreement and the content of paragraph 4 supra read with paragraph 16.1 of Defendants' Plea, Plaintiff is barred from denying that it was obliged to apply to DWAF for a water use licence and the denial therefore renders the proposed amendment expiable".

[11] The essence of Defendants complaint against paragraph 2.15.1 of the notice of amendment is that it is submitted that the plaintiff did not deny that the prospecting right, the environmental management plan and the draft agreement formed part of the prospecting agreement which the parties entered into. It is common cause on the pleadings that the parties entered into an oral prospecting agreement. In paragraph 7.2 of the Defendants' plea on Plaintiff's claim, which is

incorporated in the counter-claim, the Defendants alleged that the prospecting right which was issued in terms of the Mineral and Petroleum Resources Development Act, Act no 28 of 2002 as amended (the MPRD Act) formed part of the prospecting agreement. In paragraph 13.5 of the plea Defendant alleged that the Environmental Management Plan (the EM plan) also formed part of the prospecting agreement. Despite these admissions Defendant nowhere in the pleadings expressly alleged that the draft agreement formed part of the prospecting agreement. Consequently no direct denial of the draft agreement was required.

[12] In any event, in paragraph 2.14 of the existing plea on the counter-claim, Plaintiff denied each and every other allegation contained in the counter-claim, consequently the Plaintiff did indeed deny the allegations referred to above. Even if it could be argued that the Defendant by implication in paragraph 16 of the plea admitted that the draft agreement formed part of the prospecting agreement, it is directly denied in the proposed paragraph 2.15. As a result there is no merit in this objection.

[13] The next complaint deals with par 2.16.2 of the notice of amendment, which is a plea on par 18 of the Defendants plea. Paragraph 18 of the plea reads as follows:

"18. It was a term of the Prospecting Agreement that Plaintiff, as contractor/pro prospector, would be responsible for the rehabilitation of the Prospecting Area and indemnified First Defendant against any claim or claims instituted by the Regional Manager in connection with any rehabilitation operations."

[14] In the proposed notice of amendment par 2.16 the Plaintiff pleaded as follows to paragraph 18 of the plea:

"2.16 Wat paragraaf 18 van die Verweerders se pleit betref, pleit die Eiser spesifiek soos volg:

2.16.1 Dit word erken dat dit 'n term was van die prospekteerooreenkoms dat die Eiser verantwoordelik sou wees vir rehabilitasie van die prospekter gebied; en

2.16.2 ledere en elke ander bewering in hierdie paragraaf vervat word ontken asof spesifiek teengesprek".

[15] In the notice of objection the Defendants state as follows regarding par 2.16.2:

"6. Ad sub-paragraph 2.16.2 of the Notice of Amendment (re paragraph 18 of Defendants' Plea):

6.9 In sub-paragraph 2.16.1 of the Notice of Amendment, Plaintiff admits that "it was a term of the Prospecting Agreement that plaintiff, as contractor/pro prospector, would

*be responsible for the rehabilitation of the prospecting area" (herein referred to as "**the rehabilitation obligation**).*

6.2 *In sub-paragraph 2.16.2 of the Notice of Amendment, plaintiff denies that in terms of the Prospecting Agreement it "indemnified First Defendant against any claim or claims instituted by the Regional Manager in connection with any rehabilitation operation" (hereinafter referred to as "**the indemnification**).*

3. *In view of Plaintiff's admission of the content of the Prospecting Right, the Draft Agreement and the content of paragraph 4 supra read with paragraphs 18 and 22 of Defendants' Plea, Defendant is barred from denying the indemnification and the denial therefore renders the proposed amendment excipiable. Paragraph 22 of Defendants' Plea refers specifically to clause 3.7.10 of the Draft Agreement, the content whereof has been admitted by Plaintiff.*

4. *The indemnification also constitutes the natural consequence of the rehabilitation obligation, which obligation has been admitted by plaintiff in sub-paragraph 2.16.1 of the Notice of Amendment."*

[16] In paragraph 2.16 of the proposed plea to the counter-claim plaintiff admits that it was responsible for the rehabilitation of the prospecting area, the rest of the allegations contained in paragraph 18 are denied.

[17] Defendants' objection is that plaintiff can't at the same time admit the obligation to rehabilitate while denying the obligation to indemnify. Plaintiff however argued that the obligation to rehabilitate and the obligation to indemnify are two distinct obligations as in **Emco (SA) (Pty) Ltd v P Maltioda's Construction Co (SA) (Pty) Ltd**¹ and **Dodd v Estate Cloete**² it was found that a claim for damages (which will follow if plaintiff breaches its responsibility to rehabilitate) can't be equated to a right to indemnify. This submission is correct and as a result the objection against the amendment has no merit.

COSTS:

[18] Plaintiff requested a punitive costs order and argued that as a result of the delay caused such an order will be appropriate. I am however of the view that such an order will not be appropriate as the Defendants' decision to launch the objection on the papers does not seem to be *mala fide* or an abuse of process.

[19] **Consequently I make the following order:**

**19.1 Condonation is granted for the late filing of the application
for leave to amend;**

¹ 1967(1) SA 326 (N) on 332 H-33A

19.2 Leave is granted to Plaintiff to amend its plea in accordance with Plaintiff's notice of amendment filed on 14 December 2015; and

19.3 Defendants are ordered to pay the costs of the application jointly and severally the one paying the other to be absolved.

A handwritten signature in black ink, appearing to read 'R G Tolmay', is written over a horizontal line.

**R G TOLMAY
JUDGE OF THE HIGH COURT**

DATE OF HEARING:	6 FEBRUARY 2017
DATE OF JUDGMENT:	21 FEBRUARY 2017
ATTORNEY FOR APPLICANT:	JAPIE VAN ZYL PROKUREURS
ADVOCATE FOR APPLICANT:	J P VORSTER (SC)
ATTORNEY FOR DEFENDANT:	LK JOUBERT ATTORNEYS
	JAFFER INC