



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

27/3/2015

CASE NO. 39677/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES / NO
<u>27/3/2015</u>	
DATE	SIGNATURE

In the matter between:

MUSGRAVE AGENCIES CC

Applicant

and

WR HOFFMAN

Respondent

JUDGEMENT

DE VOS J:

- [1] In this matter the Applicant, in two interlocutory applications which are heard simultaneously, seeks an order against the Defendant that certain amendments effected by the Defendant to his plea be set aside. Plaintiff instituted an action against the Defendant. Defendant defends the action and filed a plea. In the present matter, Plaintiff is the applicant. Defendant in these applications is respondent. For convenience the applicant will be referred to as Plaintiff and the respondent as the Defendant. Both interlocutory applications relate to amendments affected to the Defendant's plea.

Background before any amendments were effected to the particulars of claim and Defendant's plea thereto.

- [2] It is common cause that Plaintiff instituted an action against Defendant seeking judgement in the sum of R2 653 347,05 plus interest and costs for goods sold and delivered. After summons was served, Defendant filed a plea denying liability. Plaintiff then amended his particulars of claim by adding additional/alternative claims in terms of the Close Corporations Act. Defendant failed to file a plea to the amendments within the time periods specified by the Rules of the Court. Only some time thereafter, Defendant proceeded to file an amendment to his plea. These amendments give rise to the present applications.
- [3] It is common cause that neither the quantum nor the delivery of the goods is in dispute. The only dispute relates to Defendant's defence that he is not personally liable for the debt to Plaintiff. Defendant has pleaded that four close corporations through which he traded, and which are now dormant are liable to Plaintiff for the debt.
- [4] It is further common cause:
- (a) That Defendant commenced trading in his own name;
 - (b) Defendant applied to Plaintiff for credit in his own name;
 - (c) That the four closed corporations never applied to Plaintiff for credit;
 - (d) That Defendant failed to produce a single voucher or document in support of his defence that Plaintiff agreed to trade with the four close corporations.
- [5] To complete the background before the amendments were effected, it is also common cause that Defendant pleaded that an independent sales agent, Craig

Kourie, whose services are utilised by Plaintiff to source sales, was aware that Defendant traded through the four close corporations. In reply thereto Plaintiff pleaded that Kourie's testimony will be to the effect that he was not so aware.

The amendments by Plaintiff of its particulars of claim and Defendant's failure to file a plea.

- [6] After Defendant has pleaded to Plaintiff's original claim, Plaintiff amended his particulars of claim introducing alternative claims to the main claim which was left unaltered. The amendment is based on certain statutory provisions contained in the Close Corporations Act. This amendment was effected on 11 February 2014 and was unopposed.
- [7] It is not in dispute that Defendant had until 20 March 2014 to effect any consequential adjustment to his plea arising from the amended particulars of claim. Defendant failed to file a plea within the prescribed period dealing with the new issues raised in the amendments.
- [8] The failure by Defendant to adjust his plea consequently had the effect and result that Plaintiff's alternative claims were deemed to be admitted.
- [9] The trial in the main action was set down for hearing on 2 June 2014.

Urgent Application brought by Plaintiff.

- [10] It is Plaintiff's contention that at that stage of the proceedings it was entitled to default judgement against Defendant based on the alternative claims which were not opposed. In order to avoid unnecessary wasting of cost in preparation of the

trial, Plaintiff brought a semi-urgent application to this Court, seeking default judgement against Defendant on the alternative claims. The Urgent Court held that the matter was not urgent and struck it from the roll with costs. The trial itself did not proceed and was adjourned by agreement. The cost of the trial was reserved.

Defendant's attempt to amend his plea which gave rise to the first interlocutory application.

- [11] Subsequent to the postponement of the trial, the Defendant sought to cure his failure to adjust his plea by involving the provisions of section 28(1) of the Uniform Rules of Court which are designed to permit a litigant to effect an amendment to his or her pleading. On 25 April 2014, Defendant served a notice on Plaintiff in terms of Rule 28(1), notifying his intention to effectively plead consequentially to Plaintiff's alternative claims as set out in the first interlocutory application. In response thereto Plaintiff served on the Defendant a notice under Rule 30(2)(b) calling upon the Defendant to cure an improper or irregular step. The Plaintiff's objection is based on the fact that at that stage of the proceedings the pleadings were closed and that any amendment to the Defendant's plea could only be effected by leave of the Court. The Plaintiff contends that thereafter the Defendant, instead of curing the defect by seeking leave from the Court by way of an application to amend supported by the necessary affidavits, proceeded to act as if its Rule 28(1) notice had been complied with and purported to effect an amendment to his plea by serving "amended pages".

The second interlocutory application

- [12] Subsequent thereto Defendant then attempted to effect an amendment to his first attempt at an amendment and proceeded to do so as if he could do so again using

the provisions of Rule 28(1) of the Uniform Rules of Court. Once again Plaintiff served a Rule 30(2)(b) notice on Defendant calling upon the Defendant to cure what Plaintiff considered to be an improper or irregular step. Defendant ignored the Rule 30(2)(b) notice and purported to effect a second amendment to his plea by serving "amended pages". This led to the second interlocutory application brought by the Plaintiff.

[13] This then resulted in Plaintiff launching the two interlocutory applications in terms of Rule 31(1) read together with Rule 30(2)(c) in respect of each of Defendant's attempts to amend his plea by using the provisions of Rule 28(1).

[14] The crisp issue to be determined in both interlocutory applications is whether the procedure followed by the Defendant to effect an amendment to his pleadings can be sustained. For purpose of this judgement I find it unnecessary to deal with the issues raised in the urgent application as the legal issue to be determined is not dependant on whether a specific party is deliberately stalling the process or not. The only issue is what procedure is applicable to amend a pleading where a Defendant failed to file a plea after a new cause of action has been introduced to a Plaintiff's claim by way of amendment to his particulars of claim.

[15] It is common cause on the papers that pleadings were closed on 20 March 2014. Rule 29(b) of the Uniform Rules of Court provides pleadings shall be considered closed:

'(a) . . .

(b) if the last day allowed for filing a replication or subsequent pleadings elapsed and it has not been filed'.

- [16] In terms of Rule 22(2)(a) of the Uniform Rules of Court a Defendant is required to either admit, deny or confess and avoid all material facts alleged in a summons or declaration. If a Defendant fails to comply with the provisions of Rule 22(2) this failure will be deemed to constitute an admission of the facts alleged by the Plaintiff.
- [17] In the present instance, Defendant failed to serve a plea to the amended claim within the specified period stated in Rule 25. Rule 26 of the Uniform Rules of Court provides that any party who fails to deliver a replication or subsequent pleading within the time stated in Rule 25 shall be ipso facto barred.
- [18] The Defendant contends that he delivered a notice of intention to amend his plea in terms of Rule 28(1) dated 25 April 2014 and served it on Plaintiff on 25 April 2014. The Defendant contends that this entitled him to amend his plea without obtaining leave to amend from the Court. Plaintiff did not object to the notice of amendment in terms of Rule 28(3) but delivered a notice in terms of Rule 30(2)(b) to the effect that the Defendant had, by delivering its notice of intention to amend, taken an irregular step in the proceedings. No notice was received in terms of Rule 28(2) from the Plaintiff and Defendant accordingly effected the amendment in terms of Rule 28(5). The Plaintiff thereupon and in return delivered a further Rule 30(2)(b) notice consequent upon Defendant effecting the amendment.
- [19] Defendant contends that Defendant was compelled to respond to Plaintiff's amended particulars of claim in compliance with Rule 28(8).
- [20] Plaintiff's contention is that:

- (a) Defendant is precluded from making any amendment of his plea consequent and in response to the Plaintiff's amendment of the particulars of claim in terms of Rule 28(1) by virtue of the provisions of Rule 28(8), and;
- (b) Any amendment involving the withdrawal of an admission must be done by way of application accompanied by an affidavit.

[21] Before me Defendant's counsel argued that Rule 28(8) is not preemptory and merely states that a party affected by any amendment may, within 15 days after the amendment has been effected, make any consequential adjustment to the document filed by him.

The word "may" is indicative that the party concerned has the choice as to whether or not he intends adjusting the documentation as filed, or not. The question then arises if by choosing to not adjust his documents, he is in perpetuity barred from doing so. Defendant contends that a direct consequence of the use of Rule 28(8) to respond to the other party's amendment, is to make the adjustment simpler, in that the procedures in terms of Rules 28(1) 28(2), 28(3), 28(4) and 28(5) do not have to be followed. Therefore, the effect of this is that if one party brings an amendment in terms of Rule 28(1) which is duly effected, the other party has an automatic right to follow the simple procedure set out in Rule 28(8) to respond thereto by bringing a consequential adjustment it may deem necessary in the circumstances. Defendant further contends that the party effecting the original amendment has no right to object to that amendment in terms of Rule 28, although such party will obviously be entitled to object inter alia on the grounds of exception et cetera.

[22] The Defendant further contends that Rule 28(8) precludes the use of Rule 28(1). Rule 28(1) contains no time limits to a party and only requires from a party desiring to amend a 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. Subrule 28(2) requires from a party who intends to amend to state in its notice that unless written objection to the notice of the proposed amendment is received within 10 days of delivery of such notice, the amendment will be effected. Subrule 28(3) requires that the grounds for the objection shall be clearly and concisely stated. Subrule 28(4) provides that if an objection complying with subrule 28(3) is delivered within the time period referred to in subrule 28(2), the party wishing to amend may, within 10 days, lodge an application for leave to amend. Subrule 28(5) provides that if no objection is delivered as contemplated in subrule 28(4) every party who received a notice of the proposed amendment shall be deemed to have consented to the amendment. Thereafter the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule 28(2), effect the amendment as contemplated in subrule 28(7).

[23] Defendant submits that the provisions of Rule 28(1) have to be read with the provisions of Rule 28(2), (3), (4) and (5). If a party objects to a proposed amendment, Rule 28(4) applies, namely that an application for leave to amend will have to be brought by the party wishing to amend. Defendant contends that Plaintiff failed to file an objection in both applications and therefore Defendant was entitled to give effect to the proposed amendment in terms of Rule 28.

[24] At the heart of the Defendant's contentions lies the proposition that it is open to a defendant to use the provisions of Rule 28(1) to effect any consequential pleading. The Defendant accepts that the failure to plead consequentially in a plea results in a deemed admission, he (the Defendant) is still entitled to give notice under Rule 28(1) and only if the Plaintiff objects to the Defendant doing so will the Defendant be obliged to bring an application, supported by affidavit, to seek leave to amend from the Court. This ostensibly, on the basis that the Uniform Rules themselves do not require an application supported by affidavit, when an admission is sought to be withdrawn.

[25] In reply thereto Plaintiff's counsel argued that neither of these contentions has any merit for the following reasons. Firstly, if a litigant could with impunity utilise the provisions of Rule 28(1) of the Uniform Rules of Court, to effect a consequential pleading and to do so at any time before judgement, there would be no purpose in Rule 28(8) providing that any consequential pleading must be effected within 15 days of any amendment effected by another litigant. It would render that 15 day window simply nugatory and goes against the established principle of interpretation which requires that every word and expression be given meaning and that they not be considered to be superfluous. The 15 day period mentioned in Rule 28(8) for effecting a consequential amendment implies that if the 15 day period is not adhered to, it is necessary for a litigant to apply to Court for a longer period. The expressed time set to effect the amendment cannot be ignored and, with impunity and without leave of the Court, simply effect a consequential amendment. Furthermore Rule 28(1) of the Uniform Rules of Court allows for the effecting of amendments "to pleadings" whereas Rule 28(8) allows for "consequential adjustments" to pleadings. A consequential adjustment is an adjustment to

pleadings and not an amendment. No amendment can be effected without a notice first being served on the other litigant in terms of Rule 28(1) and setting out an invitation to the other litigant to object thereto. In sharp contrast and contradistinction, the Rules Board has provided that when an opposing litigant has successfully effected an amendment, the other litigant is not required to serve notice of any intention to intentionally adjust his or her pleading but may do so with impunity within the window period provided therefore.

[26] The real dispute between the parties is whether the Defendant is entitled to amend his plea in terms of the provisions of Rule 28(1) when his previous failure to plea to plaintiffs amended particulars of claim constituted a deemed admission of the facts contained in the amended alternative claims.

[27] In order to determine this dispute two different and independent issues must be considered. The first issue is when and how can a deemed admission of the alternative claims be withdrawn by a defendant who failed to adjust or failed to amend its plea during the time period (i.e. 20 March 2014) referred to in the pleadings. It is common cause that the admission referred to in this matter is a so-called 'deemed' admission, i.e. the Defendant has not in fact made the admissions but has been deemed to have done so by his failure to file a plea within the prescribed period to the amended claim. It is trite law in the case of an application seeking to withdraw an admission, such application will have to be accompanied by an affidavit setting out the grounds for the withdrawal of such an admission. See *Erasmus* Superior Court Practice, Rule B-1 p178 and p182 paragraph (f). In my view this principle applies to both actual and deemed admissions. Admissions c

[28] In *Swartz v Van der Walt t/a Sentratem* 1998 (1) SA 53 (W) at 56 I – J and 57 G – J Claassen J examined the provisions of Rule 28(4) which reads as follows:

‘28(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 (own emphasis)’.

Claassen J concluded on page 55(j) that it is therefore necessary to decide whether or not the words ‘lodge an application’ used in the ‘new’ Rule 28(4) denote the use of the formal notice of motion procedure laid down in Rule 6(1), and at p56 he concluded:

‘The question is however, whether or not a particular form of application is laid down in the “new” Rule 28(4): To my mind it is not. It simply provides that an application may be lodged for leave to amend the pleadings. The wording is analogous to the wording found in Rule 6(15) which also deals with particular kind of interlocutory application i.e. to strike out scandalous, vexatious or irrelevant material in affidavits.

Rule 6(15) states that:

“The court may on application order to be struck from any affidavit any matter which is scandalous, vexatious or irrelevant...”.

As will be noted the latter subrule merely uses the words an application.

These words are, in my view, similar to the words used in the new Rule 28(4) i.e. “lodge an application”.

In my view the words used in Rule 28(4), i.e. ‘lodge an application’, cannot in the context of an amendment, which is by nature an interlocutory application, denote an intention on the part of the legislator that the formal notice of motion procedure supported by an affidavit contemplated in Rule 6 should be adopted.

The Judge then went on stating a number of reasons for his conclusion.

[29] I am not going to refer to all the reasons relied upon by Claassen J except the very first reason where he says the following at 57 A – C:

‘ Amendments to pleadings can be of a wide variety. Some are simple and purely formal in nature, ie to amend arithmetical and clerical errors in pleadings. Other amendments may be more substantial, for example amendments seeking to withdraw an admission made on the pleadings. It is trite law that amendments constituting the withdrawal of an admission have to be done on affidavit. However, it would, in my view, be absurd to interpret the new Rule 28(4) as prescribing the use of the Rule 6 procedure in all cases of applications for leave to amend pleadings. In cases where a mere word or figure requires amendment, it would be totally absurd to file a notice of motion supported by an affidavit to secure such amendments. Affidavits would only be necessary in more substantial amendments, such as the withdrawal of admissions.’

[30] It is clear from Claassen J's judgement that admissions can only be withdrawn on affidavit. In such instances the procedure regarding amendments to pleadings set out in Rule 28 does not apply. Section 15 of the Civil Proceedings Evidence Act, no. 25 of 1965, provides that:

“It shall not be necessary for a party in any civil proceedings to prove, nor shall it be competent for any such party to disprove any fact admitted on the record of proceedings.”

In the present matter, and in the absence of evidence explaining the circumstances under which the admission was made, leave will not be given to withdraw the admission. See *Sliom v Couzyn* 1927 TPd 438 at 441.

[31] It is abundantly clear from what is said above, that not all amendments as contended by the Defendant, can be done in terms of Rule 28. In the present instance the defendant failed to file a plea to the amended particulars of claim. If no plea is filed, no amendment can be made as there is nothing to amend. The Defendant's notice to amend in terms of Rule 28(1) amounts to the initiation of "fresh proceedings" as envisaged by Rule 6. See in this regard *Yorkshire Insurance Co Ltd v Reuben* 1967 (2) SA 236 (E) at 265. The application to amend further amounts to a substantial amendment in that the defendant not only tried to withdraw an existing admission but also introduced a plea where no plea was filed in regard to the amended portion of the particulars of claim.

[32] I agree with the judgment of Rampai J in *Shell SA Marketing v Wasserman* 2009 (5) 212 at 217 (OPD) para 26. Similarly, in the present instances, no plea was filed in regard to the amended particulars of claim and no amendment can be effected thereto unless with the leave of the Court. The provisions of Rule 28 cannot be construed to amend a plea which does not exist.

[33] The plaintiff gave proper notice to the defendant prior to effecting the amendments in terms of the provisions of Rule 30(2)(b) setting out its objection to the proposed amendment. The defendant failed to heed to these objections. After the plaintiff served its first notice on defendant to cure what plaintiff considered to be an improper or irregular step taken by Defendant, Defendant proceeded to act in terms

of Rule 28(1) as if the defendant's notice had been validly effected, whereafter "amended pages" were served on plaintiff. Subsequently thereto the defendant then attempted to effect an amendment to his first attempt at an amendment and proceeded to do so as if he could do so using the provisions of Rule 28(1) of the Uniform Rules of Court. Once again plaintiff served a Rule 32(2)(b) notice on the Defendant calling upon the defendant to cure an improper or irregular step. Defendant again ignored the Rule 32(2)(b) notice and purported to amend his plea by serving a second amendment to his plea by serving amended pages. This caused the plaintiff to launch the interlocutory application in terms of Rule 30(1) read together with Rule 30(2)(c) in respect of each of these purported attempts by Defendant to amend his plea in terms of Rule 28(1).

[34] Both notices of objection sent by Plaintiff to the Defendant clearly sets out the basis for its objection, firstly that defendant failed to plea consequently to Plaintiffs amended particulars of claim and was barred from doing so, and secondly, that defendant is taken to have admitted the contents of plaintiff's amendment as he failed to plead consequently thereto. Furthermore, Defendant's attention was specifically drawn to the fact that the amendments Defendant is seeking in terms of Rule 28(1) amounts to an irregular or improper step as it amounts to a withdrawal of the admission without leave of the Court.

[35] The Defendant clearly out of convenience placed form above substance and disregarded the Rule 30 notices spelling out in detail the plaintiff's objection to each proposed amendment. In effect plaintiff repeatedly invited the defendant that if defendant wants to consequentially adjust his plea to deal with plaintiffs alternative plea then defendant should do so by way of an application supported by affidavit.

[36] In view of what I have said before, the plaintiff must succeed in its application and is entitled to an order as set out in the notices of motion. Before granting the order; I have to consider the costs involved. Plaintiff is represented by senior and junior counsel. Although punitive costs are sought by plaintiff I am not persuaded that this matter deserves a punitive cost order. Having regard to the conduct of the defendant in this matter the employment of two counsels was not a luxury but a necessity. The defendant has sought to be very technical and overly formalistic and this required research and unpacking of the Rules and the authority.

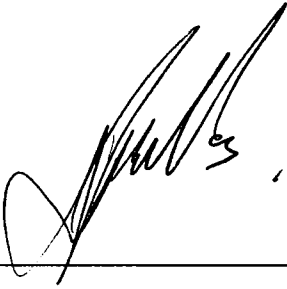
Consequently I am satisfied and notwithstanding opposition by the Defendant, Plaintiff is entitled to costs including the cost of two counsel.

I THEREFORE MAKE THE FOLLOWING ORDER:

In both interlocutory applications under Case No 39677/2011:

1. Defendant's notice of intention to amend, served on the Plaintiff on 25 April 2014, together with any and all documents served on the Plaintiff pursuant thereto, is hereby set aside on the grounds that such notice constitutes an irregular or improper step as contemplated by Rule 30 of the Uniform Rules of Court and/or such documents are declared a nullity;
2. The Defendant, to the extent that it wishes to make the amendment which it purported to do in terms of its notices of intention to amend served on Plaintiff on 25 April 2014, is directed to bring an application, supported by affidavit within 10 days of the grant of this order, failing which the Defendant is precluded, save with leave of the Court from doing so.

3. The Defendant is ordered to pay plaintiff's costs for both applications including the cost of two counsel.

A handwritten signature in black ink, appearing to be 'De Vos', is written over a horizontal line.

DE VOS J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT