

IN THE FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5471/2010

In the matter between:-

JUNGLE ARROW 50 (PTY) LTD

Plaintiff

and

MUZI MNGOMEZULU

Defendant

CORAM:

DAFFUE, AJ

HEARD ON:

8 SEPTEMBER 2011

DELIVERED ON:

15 SEPTEMBER 2011

INTRODUCTION:

- [1] Plaintiff seeks leave to amend its declaration in accordance with a notice of intention to amend dated 14 June 2011. The application is opposed by defendant. *Ex facie* the documents contained in the court file plaintiff conducts the business of a building contractor while defendant is the owner of a private dwelling situated at 21 Pelikaan Parade,

Woodland Hills, Bloemfontein. Before considering the application I deem it apposite to provide a brief historical background of the dispute between the parties.

BACKGROUND:

[2] On 1 November 2010 plaintiff issued a simple summons, claiming payment of the sum of R225 000.00 from defendant in respect of “work done, services rendered and goods supplied in connection therewith by plaintiff to the defendant at the latter special instances (sic), and request in and during a period April to September 2010 which amount is currently due, owing and payable by the defendant to the plaintiff” together with interest and costs of suit.

[3] Defendant filed a notice of intention to defend whereupon plaintiff responded with an application for summary judgment. In his opposing affidavit in the summary judgment proceedings defendant stated the following:

“3.1 I deny indebtedness to the plaintiff in the sum of R225 000.00 or any amount whatsoever. The applicant was contracted to me to undertake ‘finishing touches’ in the construction of my private dwelling. The quoted amount was paid to the applicant in full.

3.2 Despite the agreement the applicant failed to complete the work in time and only did so almost three (3) months later. Furthermore the applicant failed to perform in accordance with the specification by failing to contract the koipond and some plastering (*sic*)."

He concluded as follows in paragraph 5:

"I have a defence and a counterclaim seeing that the applicant has not performed in accordance with the agreement".

On 9 December 2010 and by agreement leave was granted to defendant to defend the main action, costs of the application for summary judgment to be costs in the cause.

[4] On 18 March 2011 plaintiff amended its summons by substituting the amount of R225 000.00 with the amount of R188 248.34 after defendant had failed to object to the proposed amendment. Having failed to plead, defendant was served with a notice of bar on 11 April 2011. On 5 May 2011, apparently out of time, defendant filed a notice in

terms of rule 23(1) affording plaintiff an opportunity to remove certain causes of complaint which allegedly rendered the declaration vague and embarrassing and/or lacking averments which were necessary to sustain a cause of action.

- [5] On 14 June 2011 plaintiff, in an apparent attempt to adhere to defendant's notice in terms of rule 23(1), served and filed its notice of intention to amend the declaration. On 29 June 2011 defendant objected in writing to the intended amendment in the following words:

"1. It changes the object of the cause of action to the prejudice of the defendant."

Hereupon plaintiff filed an application in terms of rule 28(4) which was to be heard on 4 August 2011. The application was postponed on that date to 1 September 2011 and ultimately to 8 September 2011.

- [6] On 24 August 2011, about two months after the notice of objection was filed and long after filing of the application in

terms of rule 28(4), defendant filed a document with the following heading:

“Notice of further objection and intended exception to proposed amendment.”

Herein defendant set out in detail why he was of the opinion that the cause of complaint raised in his rule 23(1) notice of 4 May 2011 had not been removed. In so far as this document may be regarded as an objection in terms of rule 28(3), it was filed hopelessly out of time and there is no application for condonation.

APPROACH TO THE APPLICATION FOR AMENDMENT:

[7] A court enjoys a wide discretion when it comes to an application to amend a particular pleading. The primary object is to obtain a proper ventilation of the dispute between the parties. The general approach to be adopted in applications for amendment has been set out in numerous cases.

See Farlam *et al*, ERASMUS: SUPERIOR COURT PRACTICE B1-178; TRANS-DRAKENSBERG BANK LTD v COMBINED ENGINEERING (PTY) LTD 1967 (3) SA 632 (D) at 638A and the following *dictum* of Ngcobo, J (as he then was) in AFFORDABLE MEDICINES TRUST AND OTHERS v MINISTER OF HEALTH AND OTHERS 2006 (3) SA 247 (CC) at par.9 p.261C:

“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 a pleading which it is sought to amend was filed’.”

- [8] An amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable. See Farlam *et al*, loc. cit. at B1-183 and the numerous judgments referred to in footnote 4; BARNARD v BARNARD 2000 (3) SA 741 (CPD) at para. 9 – 11, p. 746G & 41, p.754F; THEKWENI PROPERTIES (PTY) LTD v PICARDI HOTELS LTD (AND OTHERS AS THIRD

PARTIES) 2008(2) SA 156 D & CLD at para. 9 – 11, p. 158D

– I.

- [9] Adv Fischer SC, who appeared for defendant, conceded that the original notice of objection of 29 June 2011 did not qualify as a proper objection in terms of rule 28(3). In my view the objection is also nonsensical. He invited me to look at the substantial grounds put forward in the rule 23(1) notice and to find that the declaration will remain vague and embarrassing if the amendment is allowed.
- [10] Mr Fischer also conceded that the further objection was filed out of time, but invited me to accept it in so far as the objections raised therein are similar to those in the initial rule 23(1) notice. When I pointed out that there was no application for condonation, he requested me from the bar to grant condonation for the late filing of this document. I indicated to him that I was not prepared to do so as no reasons have been advanced as to why the document was filed late. However for purposes of consideration of this application, I shall consider the contents of the document.

[11] In considering whether the declaration will remain vague and embarrassing if the amendment is allowed, I shall take cognisance of the fact that defendant has already put forward his defence to plaintiff's claim under oath and also alleged that he had a counterclaim in so far as plaintiff failed to comply with its contractual obligations. It appears to be an easy task for defendant to plead to the declaration in its intended amended form and he will not be prejudiced in any manner if the amendment is allowed.

[12] I also take into consideration that if the amendment is allowed, defendant's right to utilise either rule 23, or rule 30 procedure (i.e. exception or irregular proceedings procedure) will not be affected prejudicially at all. See rule 28(8). Cilliers *et al*, **HERBSTEIN & VAN WINSEN: THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA** 5th Edition Vol.1 at p.683 authoritatively deals with the refusal of an amendment on the ground of excipiability as follows:

"An amendment should be refused on the ground of excipiability only if it is clear that the amended pleading *will* (not may) be excipiable. If the excipiability of the pleading is merely arguable or can be cleared by

the furnishing of particulars, then it is proper to grant the amendment where the other considerations are favourable. It will then be left to the aggrieved party to file an exception if he so desires.” (emphasis added.) See also **KRISCHKE v ROAD ACCIDENT FUND** 2004 (4) SA 358 (WLD) at 363B.

EVALUATION OF THE ARGUMENTS:

[13] Adv Pienaar, who appeared for the plaintiff, submitted that the purpose of the amendment is not to introduce a new cause of action, and even so, there can be no prejudice to defendant as such claim had not become prescribed. Mr Fischer did not argue that a new cause of action was sought to be introduced and in my view correctly so. It is apparent from the declaration in its current form that plaintiff relies on an oral agreement between the parties confirmed in writing as is apparent from annexure “A” thereto, together with an oral variation of this agreement on or about 9 July 2010. It is quite clear that in its notice of intention to amend plaintiff merely tries to clarify its cause of action. Unfortunately in endeavouring to do so the pleader pleaded unnecessary evidence and my overall impression is that the document has

been poorly and inelegantly drafted. However in my view the reasonable pleader acting on behalf of the defendant will appreciate that plaintiff relies on a first oral agreement, partly recorded in writing as is apparent from annexure “A” and a subsequent variation thereof, partly recorded in annexure “C”.

[14] In acknowledging the applicable general principles I am inclined to grant the amendment in so far as the real issue was imperfectly pleaded initially and the intended amendment, though not a model of clarity but not vague and embarrassing, is designed to place on record the true issue.

[15] The character of plaintiff’s claim is not changed by the intended amendment. See in this regard **SENTRACHEM LTD v PRINSLOO** 1997 (2) SA 1 (A) at 15A – 16F. The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties and this will be achieved by allowing the amendment.

[16] Mr Fischer argued that if defendant were to consent to the proposed amendment he would not be entitled to raise an

exception to the amended pleading as if defendant would have forfeited his right in this regard. I cannot agree with this submission. See rule 28(8) referred to above. Even if I consider the substantial grounds in the rule 23(1) notice as Mr Fischer has invited me to do, together with the grounds set out in the belated second notice, I am still unpersuaded that the amendment should not be granted. At best for defendant it may be argued that the amended pleading may be (and not will be) excipiable. The relevant test has not been satisfied. I am not prepared to find that the amended pleading will be excipiable. It is reiterated that this is not a case where the amended pleading might be excipiable because no cause of action has been pleaded, but that it is vague to such an extent that it is embarrassing.

- [17] Mr Fischer suggested that I should consider disallowing the amendment, but to allow plaintiff a period of ten (10) days to amend afresh and to make no order as to costs. Alternatively he suggested that the matter be removed from the roll as plaintiff will in any event have the right to file a new notice of intention to amend and that no order as to costs should be made. In reply Mr Pienaar argued that the

intended amendment will not be meaningless or capable of more than one meaning and insisted that relief be granted in accordance with the notice of application.

[18] The declaration in its amended form will not be a masterpiece, but not vague and embarrassing. It will allow an opportunity to obtain a proper ventilation of the real dispute between the parties. Consequently I am satisfied that plaintiff has made out a proper case for the relief claimed.

[19] Prayers 1, 2, 3 and 4 of the notice of application are granted.

JP DAFFUE, AJ

On behalf of Plaintiff: Adv. CD Pienaar
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of Defendant: Adv. PU Fischer SC
Instructed by:
Moroka Attorneys
BLOEMFONTEIN