IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 681/2004

In the matter between:-

SHELL SA MARKETING (EDMS) BPK Applicant

and

JG WASSERMAN h/a WASSERMAN TRANSPORT Defendant

HEARD ON: 31 JANUARY 2008

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 5 JUNE 2008

---

[1] These are interlocutory proceedings. The matter was brought by way of an application in terms of rule 30(1). The application was the plaintiff's response to the defendant's proposed amendment of its plea and the introduction of a counterclaim. The relief sought is to have the proposed amendment declared an irregular step and the notice thereof set aside. The defendant opposes the plaintiff's application.

[2] Briefly stated the factual background is as follows: The plaintiff sued the defendant in this court under case number

681/2004. The summons was issued and served on the defendant. The defendant opposed the main claim. The defendant's plea was delivered on 22 June 2004. No counterclaim was simultaneously filed with the defendant's plea (rule 24(1)). *Litis contestatio* was reached in due course.

[3] On 14 December 2007 the defendant delivered notice of amendment (rule 28). The proposed amendment concerned the defendant's plea. However, the amendment was drafted in such a manner that the defendant's plea would, after its amendment, effectively accommodate the introduction of a counterclaim.

[4] On 18 December 2007 the plaintiff delivered notice of its objection (rule 30(2)(b)). The defendant was afforded an opportunity of removing the cause of the plaintiff's complaint. The attitude of the defendant apparently was that the plaintiff's complaint was groundless. The defendant did not do anything to remove the cause of the plaintiff's complaint. The prescribed ten day period elapsed. The cause of the

complaint remained. The plaintiff then initiated these proceedings on 22 January 2008.

[5] In the notice of amendment of its plea dated 14 December 2007 the defendant alleged that from 1 December 1999 the plaintiff supplied the defendant with certain goods and that every month the plaintiff calculated the amount owing by the defendant to the plaintiff in respect of diesel, lubricants and tollgate charges. On the 15th of each month the plaintiff then recovered such amount through a direct debit order against the defendant's bank account. In terms of the agreement the plaintiff was obliged to furnish the defendant with written monthly statements or reports of the goods supplied to the defendant by the plaintiff during the previous month.

[6] As a result of the plaintiff's failure to provide such written monthly statements, the proposed amendment goes on, the defendant was not in a position to control or to verify the monthly amount the plaintiff had debited against the defendant's bank account. During November 2005 the defendant received, for the first time, written monthly statements of account from the plaintiff although they were

incomplete. The defendant then embarked upon the exercise of reconciling the amounts the plaintiff recovered directly from its bank account as against the quantities of the goods supplied to the defendant tanker or truck by truck. After proper reconciliation of the plaintiff's documentation the defendant discovered that during the period of June 2003 to July 2003 the plaintiff had recovered from its bank account the sum of R364 601,51 more than the plaintiff was entitled to. This then is the sum of money the defendant wants to recover from the plaintiff by way of a counterclaim.

[7] Together with the notice of amendment of the plea, the defendant also delivered the proposed counterclaim as referred to in paragraph 1 and 2 of the notice of amendment. The counterclaim is an eight page pleading. I shall try as best as I can to condense it. The defendant avers that the parties entered into a written agreement at Harrismith on 1 September 1999 whereby the plaintiff supplied the defendant with certain goods and the defendant paid the plaintiff by way of a debit order. The plaintiff failed to provide the defendant with written monthly reports of how the amounts debited

against the defendant's bank account were made up and calculated.

[8] As a result of the plaintiff's failure to carry out this contractual obligation, the defendant was not in a position to verify the correctness of the amount so debited against its bank account. In November 2005 the defendant discovered that the plaintiff had incorrectly debited its bank account with an excessive sum off R364 601,51 for the period June 2003 to July 2003. According to the reconciliation done by the defendant, the amount of R364 601,51 was, in fact, not owing by the defendant to the plaintiff. On that premise the plaintiff was indebted to the defendant in the sum of R364 601,51 plus interest thereon. This in brief was the gist of the defendant's counterclaim against the plaintiff.

[9] The crisp question in the case is whether it is permissible for a defendant to introduce a counterclaim long after a plea has been delivered by amending a plea in such a manner that an amended plea, unlike the original plea, now accommodates a counterclaim.

[10] Mr. Loubser argued, on behalf of the plaintiff, that it was impermissible and irregular for the defendant to attempt to introduce the counterclaim in an action where the defendant's plea had long been delivered, by simply amending the defendant's plea in such a manner that the amended plea now accommodates a counterclaim.

[11] Mr. Snyman argued, on behalf of the defendant, that it was regular and therefore permissible for the defendant to introduce a counterclaim by way of an amendment. The foundation of his submission was that rule 24(1) did not (and does not) prohibit such a procedure.

[12] Rule 24(1) provides:

> "A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in Reconvention'. It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention."

[13] Rule 28(1) provides:

> "Any 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."

[14] Rule 30(1) provides:

> "A party to a cause in which an irregular step has been taken by another party may apply to court to set it aside."

[15] In **SEARLE v SEARLE** 1967 (2) SA 19 (O) at 21 A – C the court decided per Erasmus J that a counterclaim could not be introduced after a defendant's plea had been filed.

[16] In **VAN JAARSVELDT v NEL** 1974 (1) SA 103 (T) at 107 F – 108 C the court held per Viljoen J that a counterclaim could still be introduced after a defendant's plea had already been filed.

[17] It appears that the legislative organ preferred the generous construction of the rule as was adopted in the latter decision of **VAN JAARSVELDT**-case, *supra*, to the strict construction as was adopted in the earlier decision of **SEARLE**'s-case,

supra. It was, presumably, in response to the **SEARLE**'s decision that the legislature amended the rule in 1987 to provide for the two exceptions. Where a counterclaim has not been simultaneously delivered with a plea, it may now be subsequently delivered with the consent of the plaintiff or with the leave of the court, if the plaintiff refuses.

[18] The delivery of a counterclaim contrary to the rule constitutes an irregular step liable to be declared as procedurally impermissible and to be set aside - Harms: **Civil Procedure in the Supreme Court** on p. B172 at par. B24.3.

[19] It is generally permissible and regular for a defendant to amend its existing pleadings, including its plea and counterclaim, in order to have the real dispute clarified where the wording of a pleading, for one reason or another, might be incomplete, ambiguous or technically incorrect. It seems crystally clear to me that rule 28(1) was designed to provide for the amending of a pleading that already exists and already filed in connection with any pending civil proceedings. It was not designed to serve as an avenue for the creation and introduction of new pleadings.

[20] The procedure for the lodging of a counterclaim is regulated by rule 24.1. In terms of the rule there are three possible ways of delivering a counterclaim. In the first place, a counterclaim must be simultaneously delivered with a plea. This is the ideal and preferred method. The defendant has an automatic right to do so. In the second place, a defendant may, with the consent of the plaintiff, deliver a counterclaim after a plea has been delivered. In the third place, a defendant may, where the consent is refused, deliver a counterclaim with the leave of the court, first sought and obtained, after a plea has been delivered. In the last two scenarios the defendant has no automatic right – rule 24(1).

[21] In the instant case the defendant has not followed any of the three regulatory methods. The defendant's counterclaim was not filed together with its plea at the same time, namely 22 June 2004. This is the first problem. The plaintiff's consent to accept the late delivery of the defendant's counterclaim has not first been sought and obtained. This is the second problem. There is no formal and substantive application before the court to authorise the late delivery of

the defendant's counterclaim. This is the third problem. I am in the dark as to why the defendant ignored the relevant rule.

[22] I have earlier observed that the defendant had an automatic procedural right to deliver its counterclaim together with its plea. That right availed to the defendant until the moment its plea was filed. The moment the plea was delivered the defendant automatic procedural right ceased to exist. Since the defendant did not simultaneously exercise such right, it was extinguished through effluxion of time.

[23] After the extinction of the defendant's automatic procedural right, he was not remediless. By law the defendant acquired a relative procedural right to deliver its belated counterclaim provided the plaintiff agreed, failing which provided the court sanctioned the late delivery thereof on application by the defaulting defendant. Upon the demise of the defendant's automatic right to deliver its counterclaim simultaneously with its plea, the plaintiff acquired an absolute procedural right to be first consulted and its consent sought before the defendant could approach the court to allow the late delivery of its counterclaim.

[24] The procedure adopted by the defendant is a radical departure from the recognised procedure outlined in rule 24(1). Moreover, it bypasses the plaintiff and thereby negates the plaintiff's absolute procedural right and creates another new method whereby a belated counterclaim may be introduced. There are only two specified subsequent methods whereby a belated counterclaim may be introduced. However, amending a plea so that such an amendment can be used as a vehicle for the introduction of a counterclaim, is not one of such specified methods.

[25] To allow the subsequent filing of a belated counterclaim via such an obscure route would not only infringe the plaintiff's right and undermine the authority of the court, but would defeat the purpose for which rule 24(1) was enacted. To allow the creation and filing of new pleadings years after the pleadings have been closed would render the principle of *litis contestatio* virtually meaningless.

[26] Although a defendant may amend its pleadings, including its plea and, of course, its counterclaim where one has been duly and previously delivered, in order to perfect the

elegance thereof, that is not what we really have here. It is not the defendant's case that the plea does not properly reflect the real dispute between the parties on account of certain incomplete or ambiguous or incorrect wording. The amendment was certainly not necessitated by any such technical defects and the defendant's attendant intention to remove them.

[27 In the instant case the amendment of the plea was informed by the defendant's plain scheme to launch its belated counterclaim by using its plea as a springboard. Mr. Snyman argued that it was regular to incorporate the defendant's counterclaim in the amendment of the plea seeing that the counterclaim was so inextricably linked to the defendant's plea that it was not possible for the defendant to apply in terms of rule 24(1) in order to have the late delivery of its counterclaim condoned.

[28] The contention is flawed. Nothing in the rule can be construed to suggest that the rule was exclusively designed to cater for counterclaims that were based on separate and autonomous causes of action. In my view, it is impermissible

to circumvent the rule on the grounds that the defendant's counterclaim originates from the *causa* that is substantively inseparable from the *causa* of the plaintiff's main claim.

[29] By means of the amendment contemplated in its notice dated 14 December 2007, the defendant seeks to deliver its claim in reconvention at a stage that is some 35 months later than the date of 22 June 2004 on which the defendant delivered its plea. The defendant has neither sought the agreement of the plaintiff nor the leave of this court to deliver its counterclaim subsequent to the date on which it delivered its plea, as the rule requires.

[30] I am persuaded by Mr. Loubser's submission that the rules do not provide for the introduction of a counterclaim by means of an amendment. That being the case, the defendant's notice of its intention to amend its plea so as to introduce its counterclaim without using the procedure as laid down in rule 24(1), in my view, constitutes an irregular procedural step which justifies the plaintiff's objection. Therefore, I am inclined to set it aside.

[31] Elsewhere in this judgment, I indicated that there were two conflicting decisions about the subsequent and separate filing of a counterclaim. The lawmaker aware of the *obiter dicta* in the **VAN JAARSVELDT'S**-case amended the rigid rule and liberalised it by adding two more options. The amendment option, as was intimated in that case and on which the defendant now so heavily relies, was left out as no option. The only recognised options for a defendant with a belated claim in reconvention are: seek the permission of the plaintiff first and, if needs be, the leave of the court. That is the regular procedure. Both of the counsels were agreed: rule 24(1) was not followed. It is sometimes said what the law does not prohibit is permissible. However, in this case what the law expressly mentions seems implicitly to exclude what it does not, the *expressio unius* rule of interpretation applies.

[32] Counsel for the defendant conceded that the plaintiff's application complied with all the procedural requirements of rule 30(2) and that I was only called upon to determine the regularity or otherwise of the defendant's contemplated amendment of its plea along with the envisaged introduction

of its counterclaim via such an amendment. Since I have already found that the real underlying purpose of the proposed amendment was to introduce the belated counterclaim rather than to perfect its existing plea, it follows that the defendant is precluded to effect the contemplated amendment of its plea, the contemplated introduction of the counterclaim falls away.

[33] The application of the plaintiff in terms of rule 30(1) has been successful. The plaintiff is entitled to the costs. The plaintiff's costs must be borne and paid by the defendant.

[34] Accordingly I make the following order:

34.1 The defendant's notice of its intention to amend its plea which notice was dated 14 December 2007, is declared irregular and set aside.

34.2 The defendant is directed to pay the costs hereof.

M.H. RAMPAI, J

On behalf of the plaintiff/applicant : Adv. P.J. Loubser
Instructed by:
Webbers
BLOEMFONTEIN

On behalf of the respondent:	Adv. C. Snyman Instructed by: E G Cooper Attorneys BLOEMFONTEIN

/sp
2008/05/28 10:41 AM
2008/06/02 10:04 AM
2008/06/02 12:39 PM