HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

Case No.: 5257/2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
30 May 2024	[redacted]
DATE	SIGNATURE

In the matter between:

ENZA CONSTRUCTION (PTY) LTD Applicant

and

MPUMALANGA ECONOMIC GROWTH AGENCY First Respondent

MPUMALANGA DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT Second Defendant

MPUMALANGA DEPARTMENT OF ECONOMIC DEVELOPMENT AND TOURISM Third Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 30 May 2024 at 10:00.

JUDGMENT

BHENGU AJ

[1] This is an interlocutory application for separation of issues in terms of Rule 33(4) of the Uniform Rules. The applicant seeks judgment against the respondents on the basis of the admissions made by the defendants in their joint plea. The application is only opposed by the second respondent.

[2] In response to the interlocutory application, the second respondent (second defendant) brought a counter application where it sought to distance itself from the joint plea that was filed by the office of the State Attorney on behalf of all defendants. The second defendant seeks leave to withdraw admissions made in the joint plea filed and leave to file its amended plea. The counter application is opposed by the applicant.

[3] Both parties have agreed to the separation of issues.

[4] The preliminary issue before this Court is to determine whether or not the amendment sought by the second respondent should be granted; and

[5] Whether the applicant has made out a case for default judgment in view of the counter application to amend.

Parties

[6] The applicant in the interlocutory application is the plaintiff in the main action and is the respondent in the counter application.

[7] The second respondent in the interlocutory application is the second defendant in the main action and is the applicant in the counter application.

[8] I will refer to the parties as they are cited in the main action.

Background facts

[9] The dispute between the parties has its genesis from a building contract entered into between the plaintiff and the first defendant on 01 April 2019 for the construction of the Mpumalanga International Fresh Produce Market ("the contract")[1]. The terms of the contract are common cause between the parties, and I need not restate them.

[10] The second defendant was initially not a party to the contract. In an agreement of cession[2] entered into between the parties and the Memorandum of Agreement between the defendants[3], the first defendant ceded and assigned all its rights, titles, interest, responsibilities, liabilities, and obligations in terms of the main agreement (Construction of New Mpumalanga International Fresh Produce Market) to the second defendant.

[11] On the 24 November 2022 the plaintiff issued summons against the defendants where the plaintiff sought, inter alia, an extension of time for the Practical Completion of the Works, payment of expenses and losses occasioned by delay in the Practical Completion of the Works and associated preliminary costs.

[12] In response to the plaintiff's particulars of claim the defendants, duly represented by the office of the State Attorney filed a joint plea on 26 April 2023. The joint plea raised two special pleas for non-compliance with section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 and non-compliance with the provisions of section 2 of the State Liability Act 20 of 1957, read with sections 3 and 5 of the Act.

[1] Particulars of claim para 7-9 (Annexure POC 1 Principle Building Agreement)
[2] Agreement of cession dated 14-03-2023 (Annexure SD1
[3] Memorandum of agreement between the defendants dated 11 February 2021 (Annexure POC5)

[13] In its joint plea the defendants admitted the contents of the particulars of claim dealing with the description of the parties and the jurisdiction of the court. The defendants pleaded as follows to the balance of the allegations in the particulars of claim:-

"AD Paragraph 7 – 148 and sub-paragraphs thereof

The defendant's note the contents of the allegations herein and can therefore not admit nor deny them".[4]

The Legal Framework

[14] The law relating to amendments is settled as stated in the Constitutional Court Judgment of Affordable Medicines Trust and Others[5].

"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."

[15] Harms[6] provides as follows regarding withdrawal of an admission in a plea:-

"the admission in a plea cannot be withdrawn or otherwise amended by an ordinary notice of intention to amend (or notice of amendment): a substantive application to court is required. It must be shown that the admission was made in error and that the plaintiff would not suffer material prejudice if the amendment were granted."

Analysis

[16] In determining whether or not to grant the withdrawal of the admissions sought by the second respondent and the proposed amendment to its plea,

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[4] Defendants' plea para 5 – Page 259 of the bundle

[5] Affordable Medicines Trust and Others v Minister of Health and Another (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC) para 9

[6] LTC Harms Amler's Precedents of Pleadings 9 ed (2018) – Part A - 4

the Court has to consider the circumstances that led to those admissions being made and the reasons put forward for the withdrawal and amendment.

[17] In an affidavit deposed to by Mr Gustav Ludwick, a Director: Legal Services in the employ of the second defendant, the following is stated as circumstances that led to the admissions and reasons for the amendment:-

"The department instructed the state attorney to enter an appearance on its behalf, and further to appoint counsel to consult and prepare a plea. Shortly thereafter, the attorney to whom the matter was allocated to handle transferred from the Office of the State Attorney in Nelspruit to the State Attorney in Polokwane. He, however, had failed to appoint counsel and nothing further was done at the time.

"The absence of an appointed and dedicated counsel to the matter severely prejudiced the opposition of the action and when ENZA served a notice of Bar to file a plea, attorney Mdluli in the Office of the State Attorney Nelspruit prepared and filed the plea on 26 April 2023. That plea was drafted without consultation with the department…The purported admissions should never have been made, instead attorney Mdluli should have taken proper instructions from the department…should have prepared a proper plea''.

[18] The plaintiff's counsel argued that the amendment does not comply with the provisions of Rule 28(4) in that it seeks to withdraw previously made admissions and replace them with bare denials. He submitted that should the court allow the amendment; it will result in a plea that is excipiable. He further argued that the amended plea admits the material allegations of fact contained in the particulars of claim. In the result, there is no issue for trial. He asked the Court to adjudicate on both special pleas and grant judgment in favour of the plaintiff on the strength of the defendant's plea which disclosed no defence. He contended that the Second defendant failed to provide reasonable explanations for the withdrawal.

[19] On looking at the joint plea in question, Mr Mdluli, the State Attorney failed to respond to 141 averments in the particulars of claim. It is clear that the

joint plea did not comply with the requirements of Rule 22 which states as follows:-

"The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent and shall clearly and concisely state all material facts upon which he relies".

[20] I agree that the joint plea failed to put forward any defence to the plaintiff's claim and amounted to an admission of the plaintiff's claim with a value in the region of one hundred million rands. The second defendant contended that if the amendment is refused it will suffer prejudice of having to proceed to trial without presenting a proper case before the court. Regarding prejudice to the plaintiff, the second respondent contended that no prejudice will be suffered by the plaintiff, in that, the plaintiff will still be entitled to judgment if the matter proceeds to trial and the court find in its favour.

[21] Having regard to the explanations given by the second defendant that the State Attorney drafted the joint plea without taking instructions, I am persuaded that the error that the second defendant seeks to correct is not with malice.

[22] On the question whether the amendment would result in a plea that is excipiable for failure to disclose defence, the plaintiff's counsel referred this Court to a principle that was enunciated in Trans-Drakensberg Bank Ltd[7] where the court held that a party who wishes to change or add to its pleadings must explain the reason and *"show prima facie that he has something deserving of consideration, a triable issue".*

[23] The determination of whether the amended plea raises a triable issue can only be done having regard to the averments made in the second

[7] Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D) at 641

respondent's amended plea. In answering this question, the second defendant's counsel argued that an admission of a provision of a contract does not amount to admitting that the plaintiff is entitled to the relief sought. He referred to several paragraphs in the amended plea where the second defendant had outlined its defence to the plaintiff's claim. Of importance is the fact that with its amended plea, the second defendant raised three special pleas. The special plea dealing with non-compliance with section 2 of the State Liability Act, 20 of 1957 have since was abandoned by the second defendant during argument.

[24] I must re-iterate that it is not incumbent upon this Court to make a finding on whether the special pleas and amended plea will be successful at trial but to consider them for purposes of whether the second defendant succeeded in raising a triable issue that will be decided at trial.

First Special Plea - non-compliance with section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002

[25] Both parties took time to address this Court regarding what constitutes a "debt" in terms of the Act. Plaintiff contended the plaintiff's claim is for payment arising out of contractual obligations in terms of a principle building agreement and therefore is not a damages claim as contemplated in the Act. He argued that damages claim for breach of contract are found in the purview of common law which is not the case in this matter. He referred this court to a decision in Vhembe District Municipality[8] where it was found that the provisions of Section 3 of the Act only apply in a claim for damages against the organ of state.

[26] Defendant's counsel conversely contended that this matter is distinguishable from Vhembe. He referred to paragraphs 135.4 - 136 of the plaintiff's particulars of claim. He submitted that these paragraphs clearly state that the plaintiff's claim is for damages for loss it suffered as a result

[8] Vhembe District Municipality v Stewarts & Lloyds (397/2013) [2014] ZASCA para 12

of the alleged delayed instructions and therefore the provisions of the Act did apply to the claim. These paragraphs records that: -

"135.4 the delay events which are depicted in the as-built programme aforesaid…resulted not only in the plaintiff being entitled to an extension of time and additional time related P&G's, but also in the plaintiff suffering the expense and loss detailed hereunder.

136 The plaintiffs claim for expense and loss consists of two elements, namely:
a claim for the direct expenses and losses incurred by the plaintiff in consequence of the employer's failure to comply with its contractual obligations in terms of the payment of certified amounts and the appointment of necessary subcontractors".

[27] Having regard to the case as argued by both parties on this issue, I noted the following:- The plaintiff's claim is for revision of the date for practical completion of the works and the adjustment of the contract value. In addition to this claim, the plaintiff is also claiming for expenses and losses occasioned by failure of the principal agent to timeously issue contract instructions thereby resulting in a delay in the practical completion of the works. The third claim is for payments to the plaintiff of amounts which had been certified by the principal agent as being due to the plaintiff.

[28] While it is clear to me that the plaintiff's claim for revision of the date for Practical Completion of the Work and the claim for payment of the certified amounts are quantifiable based on the contact, there is however some doubt as to whether or not the claim for losses occasioned by the delay constitutes a claim for damages as envisaged in the Act. Although the plaintiff contended that the adjudication of the special pleas can be separated from the main action and decided without leading any evidence, however, I am of the view that this special plea cannot be conveniently dealt with separately. I believe that the trial court will be in a better position to make such a finding after evidence have been led as to how the amount claimed by the plaintiff is computed.

Second Special Plea – Referral to arbitration

[29] The special plea avers that: -

> *"in paragraph 49 of the Particulars of Claim, the plaintiff alleges that the cession and assignment of the contract from the first defendant to the second defendant took place on 21 June 2022. The revised version of the cession agreement relied on by the plaintiff is attached to the particulars of Claim as annexure POC 9. The cession agreement relied upon by the plaintiff provides that if there is a disagreement between the parties which is not resolved within ten working days of receipt of the notice of disagreement, the dispute shall be referred to adjudication and if either party is dissatisfied with the decision given by the adjudicator, he may give notice of dissatisfaction to the other party, whereafter the dispute shall finally be resolved by arbitration".*

[30] The plaintiff argued that the special plea falls to be dismissed on the basis that the arbitration clause relied upon by the defendant was introduced by way of a cession agreement which was signed on 14 March 2023 after the summons were issued on 24 November 2022. The plaintiff contended further that the court's jurisdiction was admitted in the joint plea.

[31] While I'm inclined to agree with the plaintiff in as far as when the revised session was signed, which is after the summons were issued, I however note that there is a dispute between the parties on the status of the cession agreement dated 21 June 2022[9] in as far as it was only signed by the plaintiff and not by the defendants.

Conclusion

[32] Having considered the issues placed in dispute by the second respondent in the amended plea and the reply by the plaintiff, I am satisfied that the amended plea does raise triable issues that require proper ventilation at the trial.

[9] Agreement of cession dated 21 June 2022 (Annexure POC 9)

[33] The Court stated the following in Nedbank v Haresh[10]:-

"In amendment applications, the emphasis is on achieving a result that would ensure proper ventilation of the fundamental issues between the litigants to satisfy the interests of justice".

[34] Though the plaintiff may be prejudiced by the amendment in that the plaintiff will not obtain its default judgment sought and will have to wait for a trial date, I take note that the matter is still in the early stages of litigation. The parties have not yet discovered, and no evidence has been led by either party. This led me to believe that the prejudice that will be suffered by the defendant should the amendment be refused far outweighs that of the plaintiff. I am of the view that the order for costs in the plaintiff's favour will recompense the prejudice suffered. I therefore grant the second respondent leave to file an amended plea.

Default judgment against the first and second defendant

[35] It is common cause that the separation application was only opposed by the second defendant. The plaintiff's counsel contended that the first and second defendant are still bound by the admissions made in the joint plea as they have not been withdrawn as parties, he asked the court to grant judgment in favour of the plaintiff against the two defendants. I am not persuaded with this argument. This is because in paragraph 3 of the notice of motion for separation the plaintiff set out its relief claimed as follows:-

"The Employer's Special Pleas are dismissed, and judgment is granted in favour of the Applicant…".

I am of the view that it will be premature to grant default judgment at this stage as it is still in dispute who is the "Employer" between the three defendants. This finding is made in reference to the two agreements of cession dated 21 June 2022 and that of 23 March 2023.

[10] Nedbank Limited v Haresh (11969/2015) [2022] ZAKZDHC 19 (11 May 2022) para 31

[36] Having granted the second defendant leave to file its amended plea, it follows that the plaintiff's application for default judgment should fail.

Costs

[37] The second defendant asked for costs against the plaintiff including costs of two counsels. He contended that the plaintiff should have withdrawn the application for default judgment and not opposed the application to amend.

[38] I agree with the plaintiff's counsel that irrespective of the decision granting leave to amend, it is trite that the party seeking the amendment should bear the costs of the amendment. In this matter I find that such costs should include the plaintiff's costs for bringing the application for separation and default judgment. It is common cause that the joint plea that the second defendant seeks to amend was filed on 26 April 2023. It took the plaintiff filing the separation application for the second defendant to realize that it should apply for the amendment.

[39] In the result, I make the following order: -

1. The plaintiff's application for default judgment is dismissed.
2. The second defendant is granted leave file its amended plea.
3. The second defendant is ordered to pay the plaintiff's costs occasioned by the amendment including costs for the separation application. Such costs include the costs of two counsels on a party and party High Court scale.

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JL BHENGU AJ
ACTING JUDGE OF HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, (MBOMBELA)

For the plaintiff:	Adv KJ Trisk SC Adv AC Russell Instructed by Paul Friedman & Associates c/o Christo Smith Attorney Inc
For the Second Defendant:	Adv TP Kruger SC Adv F Storm Instructed by Thobela Attorneys
Date of Judgment:	30 May 2024