

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 17932/18

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 19 July 2024

WJ du Plessis

In the matter between:

PRODIGY HUMAN CAPITAL ARCHITECTS **APPLICANT**
(PTY) LTD

and

ADCORP FULFILMENT SERVICES (PTY) LTD **RESPONDENT**

In re:

PRODIGY HUMAN CAPITAL ARCHITECTS **FIRST DEFENDANT**
(PTY) LTD

ADCORP FULFILMENT SERVICES (PTY) **SECOND DEFENDANT**

WEBHELP SA OUTSOURCING (PTY) LTD **THIRD DEFENDANT**

JUDGMENT

DU PLESSIS AJ

Background

- [1] This is an interlocutory application in terms of Rule 28(4) of the Uniform Rules of the Court (“Uniform Rules”). The Rule 28(1) notice was filed on 8 September 2022 and is opposed by the respondent (“Adcorp”) on two grounds, namely that the proposed amendments, if allowed, would prejudice Adcorp, as it has been filed late in the proceedings as a crucial witness passed away. Secondly, if allowed, it would render the applicant’s (“Prodigy”) particulars of claim excipiable.
- [2] The dispute arose from various agreements relating to a tender put out by MTN, which outsourced its call centre business. Prodigy entered into discussions and concluded agreements with the first defendant (“CCI”), Adcorp and the third defendant (“Webhelp”). These discussions lead to the conclusion of three agreements: a memorandum of understanding (“MOU”), a master partnership agreement (MSP) and an alleged oral agreement between MTN and all the parties (the “oral agreement”). Prodigy, in simple terms, alleges that the defendants, in breach of the MOU, MSP and oral agreement, and in collusion with each other, terminated the respective relationships with Prodigy unlawfully and without justification to secure the six-month tender and tender to the exclusion of Prodigy. It did so by fabricating allegations against the plaintiff, including that Prodigy did not pay its share of the bid costs, used confidential information, colluded with another third party to entice the tender away from the defendants, did not ensure successful marketing and promotion of the defendants to secure the award of the tender, defeated the object and purpose of the MSP and damaged the reputation of the defendants. These allegations led to the defendants cancelling the various contracts. The tender was then awarded to the defendants, and Prodigy seeks to claim damages for the loss of its share in the net profits that would have accrued to it.

- [3] The main action was instituted in May 2018, and pleadings closed in March 2020. Mr Pienaar of Adcorp passed away in November 2018. After that, discovery and inspection of discovery took place, which was completed around 2021. After considering the documents discovered, the applicant realised that they needed to amend their particular of claim. They, therefore, delivered their Notice to Amend on 8 September 2021. Adcorp objected to this on 23 September 2021 as they argue the objections are directed at the proposed amendments to the claim's merits. Prodigy then launched an application for leave to amend on 9 June 2023. The proposed amendments are relatively substantial and plead the agreements in more detail, which Prodigy states they could only add after the discovery process.
- [4] Adcorp further opposed the application firstly because the notice was late - its key witness, Mr Pienaar, passed away following the delivery of the respondent's plea. An amendment will thus prejudice the respondent. This is so because Mr Pienaar was the critical witness intimately involved in negotiating the agreements pleaded. He was the deponent of Adcorp's answering affidavit, which preceded the main action. Since the Notice to Amend comes after his passing, it deprives Adcorp of the benefit of his input in respect of the new allegations that are introduced relating to the negotiations surrounding the tenders and contracts. They state that the new pleadings go well beyond the initial negotiations, and Mr Pienaar is the only person who could assist. The other relevant functionaries in the company were only involved on the periphery and would not be able to testify to the details of the agreement. Without a good explanation for the late filing, Adcorp states that the proposed amendments will cause incurable prejudice and should be deemed *mala fide*.
- [5] Prodigy's explanation for delivering the notice of amendment at that particular stage in the litigation is that they could amend the papers only after discovery and inspection of the documents to be used at trial. It pertains mainly to quantifying the damages, which they could only do when they received the documents from Adcorp. This discovery was essential to narrow down the

dispute between the parties. Prodigy could thus abandon the tedious relief of a statement and debatement process.

- [6] Still, Adcorp persists that the amendment effected after the death of a witness gave rise to an incurable prejudice, as he was a key witness for Adcorp. They rely on *Minister of Health Gauteng v Brand In re: Brand v University of Pretoria*,¹ where the court found that the deceased's evidence was lost to the plaintiff and that an amendment would prejudice the plaintiff, which cannot be cured with a cost order. That matter dealt with prescription and when the deceased (plaintiff) knew or should have known of over-radiation (that caused damage).
- [7] Secondly, Adcorp further argues that paragraph 15B intrudes the allegation that when the second and third defendants threatened to withdraw from the Tender, it necessitates the plaintiff *with the full knowledge and consent of the second and third defendants* to approach alternative entities. In other words, Prodigy claims that Adcorp consented to it approaching alternative entities. This is material to Prodigy's case, as such a provision conflicts with the express provisions of the MSP and will potentially bear on one of the breaches alleged in a letter from Adcorp. They state that no particulars are provided when the agreement is alleged to have been concluded, with the date being important because, should it be established, it would constitute a variation of the MSP. The details of where the agreement was concluded, by whom, and whether it was concluded orally or in writing are also lacking. They say this is non-compliant with Rule 18(6) and excipiable as it is vague and embarrassing.
- [8] Thirdly, clause 11.1 deals with the bid of costs in relation to the tender, and in terms of the clause, Prodigy and the third Defendant ("Webhelp") would carry the costs on an equal basis once agreed in writing by the fulfilment partners. Adcorp alleges that Prodigy materially breached the MSP in several aspects, including not paying its share of the bid costs. Adcorp alleges to address the difficulties with regard to the breach; Prodigy seeks to introduce allegations

¹ [2005] ZAGPHC 265.

surrounding the conclusion of the agreement, where they allege that the Bid Cost Agreement was concluded between Adcorp and Prodigy, partly in writing and partly verbally. Adcorp says Prodigy must attach the written portion as per Rule 18(6), which they fail to do. This furthermore leads to the particulars being vague and embarrassing in that the Bid Cost Agreement is defined to mean the written recordal in Annexure POC2C, which conflicts with the allegation that the agreement was partly written and partly verbal, and the Bid Cost Agreement was concluded between Prodigy and Webhelp, which conflicts with the earlier allegation that it was an agreement concluded by all parties to the present action. Clarity of the pleading is vital as it bears on an issue that is material to the alleged cancellation by Adcorp of the MSP.

- [9] Prodigy disagrees – they state that their claim is based on the MOU, the MSP and the Oral agreement, with all the relevant agreements annexed to the particulars of claim. The rest of the evidence may be produced in the discovery process, should Adcorp so request. Prodigy further states that Adcorp ignores the claim that the Bid Cost agreement was partly in writing and partly verbal, focusing only on the written part of the Bid Cost agreement. It has, it states, never alleged that the written part of the Bid Cost agreement involved all the parties but that the agreement in its entirety, including the verbal part, included all the parties.

The amendment of the particulars of claim

- [10] Rule 28(1) sets out the procedure that must be followed when a party wishes to amend their pleadings. It states that

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.

- [11] Rule 28(10) states that

The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment, grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

- [12] Such an amendment is thus permissible at any stage before judgment. However, there must be a reasonable account given for the delay.²
- [13] The purpose of allowing amendments to particulars is to ensure that there will be proper ventilation of the dispute between the parties by determining the real issues between them. This way, justice may be done.³
- [14] In *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH*⁴ the Constitutional Court referred to the permissive principle that amendments are always allowed unless sought in bad faith or would cause an injustice that an award of costs cannot remedy. The converse is also true, namely, that amendments will not be allowed if the application to amend is made *mala fide* or if the amendment will cause the other party prejudice that a cost order cannot cure.⁵
- [15] The court has a broad discretion on whether to allow an amendment,⁶ and exercising this discretion judicially is guided by consideration of prejudice or injustice to the opponent.⁷ It is for the party seeking the amendment to show no prejudice. Prejudice is not when an amendment may cause the other party to lose his case against the party seeking the amendment.⁸
- [16] In *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation*⁹ the Constitutional Court

² *Zarug v Parvathie, NO* [1962] 4 All SA 5 [D & CLD] p 10.

³ *Rosenberg v Bitcom* 1935 WLD 115 at 117.

⁴ [2022] ZACC 42.

⁵ *Absa Bank Ltd v Public Protector and Several Other Matters* [2018] 2 All SA 1 (GP) at para 119. *Moolman v Estate Moolman* 1927 CPD 27 at 29.

⁶ *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) 694G–H

⁷ *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369G.

⁸ *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 294B; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 615A.

⁹ [2019] ZACC 41.

It is evident that this rule is an enabling rule and amendments should generally be allowed unless there is good cause for not allowing an amendment. This was enunciated in *Moolman* where the court held that:

“[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words, 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.” [footnotes omitted]

[17] In *Commercial Union Assurance Co Ltd v Waymark NO*¹⁰ the court said the following regarding Rule 28:

The principles enunciated in the abovementioned cases can be summarised as follows:

1. The Court has a discretion whether to grant or refuse an amendment.
2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.
3. The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue'.
4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.
5. The party seeking the amendment must not be *mala fide*.
6. It must not 'cause an injustice to the other side which cannot be compensated by costs'.
7. The amendment should not be refused simply to punish the applicant for neglect.
8. A mere loss of time is no reason, in itself, to refuse the application.
9. If the amendment is not sought timeously, some reason must be given for the delay.

[18] Taking the above into account, specific the dicta in *Villa Crop Protection* that amendments should always be allowed unless sought in bad faith, the application for amendment should succeed. Firstly, while the death of the key witness is unfortunate, the case is not comparable to *Minister of Health Gauteng v Brand In re: Brand v University of Pretoria*.¹¹ That case dealt with a person in his personal capacity and questions surrounding subjective knowledge for purposes of prescription. Witnesses absent for various reasons provide a challenge for Adcorp, but that challenge does not prevent Prodigy from seeking

¹⁰ 1995 (2) SA 73 (TK).

¹¹ [2005] ZAGPHC 265.

the amendment it sought in this case. Prodigy applied for the amendment and provided a sufficient explanation as to why they could only do so at the specific stage of litigation. The amendment clarifies the circumstances of the conclusion of the contract. While understandably this might make Adcorp's defence more difficult, Adcorp did not convince me that it was sought in bad faith.

- [19] This leads to the question of whether the amendments should not be allowed because the particulars of claim will be excipiable.

Will the amendment render the particulars of the claim excipiable?

- [20] Adcorp alleges that the proposed amendment would render the particulars of the claim excipiable since Prodigy pleads an agreement but fails to furnish the details of the agreement, where it was concluded, by whom it was concluded and whether it as a written or an oral agreement.

- [21] Rule 18 sets out what must be contained in the pleadings. It must set out the facts a party relies on for their claim (or defence, or answer). Rule 18(6) deals specifically with the requirements for pleading a contract, namely

A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

- [22] When considering whether a pleading is excipiable, it must be considered as a whole.¹² This requires reading the pleadings as a whole and not paragraphs in isolation.¹³

- [23] Prodigy states that they complied with this requirement as they rely on three contracts in its cause of action: a Memorandum of Understanding, a Master Partnership Agreement and an Oral Agreement. Adcorp claims non-compliance with rule 18(6) due to the word "consent" in the amendment. Prodigy states that

¹² Living Hands (Pty) Ltd v Ditz 2013 (2) SA 368 (GSJ) at 374G.

¹³ Southernpoort Developments (Pty) Ltd v Transnet Ltd 2003 (3) SA 665 (W).

the claim is based on a breach of the agreements, not the consent aspect, as Adcorp argues. In any event, Prodigy replies that if the pleadings are read as a whole, the claim will not be excipiable.

- [24] Having had regard to the pleadings as a whole, Prodigy does set out the details of the circumstances surrounding the conclusion of the contracts. In the litigation stages that follow, it will be up to Adcorp to request more detail or challenge the allegations at trial. The written agreements were annexed, and the oral agreements sufficiently pleaded to reply. Whether the allegations will convince the trial court once the evidence is presented is not for this court to predict.
- [25] The default position in amendments is that the granting of an amendment is an indulgence and that the party seeking it is generally liable for all the costs occasioned by the amendment. This includes the costs of opposition as if it is not unreasonable,¹⁴ although this is not the only criterion.¹⁵ Nothing on the papers convinced me that the opposition was unreasonable, and I see no reason why the Applicant should not bear the cost of the amendment, including the opposition.

¹⁴ *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 347C–D.

¹⁵ *Rabinowitz v Van Graan* 2013 (5) SA 315 (GSJ) at 324D–G.

Order

[26] I, therefore, make the following order:

1. The Applicant (plaintiff in the trial action) is granted leave to amend its particulars of claim.
2. The particulars of claim are amended in accordance with the plaintiff's notice of intention to amend dated 8 September 2021.
3. The Applicant is directed to pay the costs of the application.



WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines and sending it to the parties/their legal representatives by email.

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Instructed by:	MVMT Attorneys
Counsel for the respondent:	A Michael
Instructed by:	Eversheds Sutherland Inc
Date of the hearing:	22 May 2024
Date of judgment:	19 July 2024