



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable

Case no: 245/ 2024

In the matter between:

METSIMAHOLO LOCAL MUNICIPALITY

APPLICANT

And

UNITRADE 1047 (PTY) LTD

t/a ISIDINGO SECURITY SERVICES

RESPONDENT

Neutral citation: *Metsimaholo Local Municipality v Unitrade 1047 (Pty) LTD
t/a Isidingo Security Services (245/2024)*

Coram: **Daniso J**

Heard: **08 August 2024**

Delivered: **25 October 2024**

ORDER

1. The applicant is granted leave to amend paragraphs 1 to 7 of its plea and paragraphs 39, 42 and 88 of its claim in reconvention) within ten (10) days of this order.
2. Leave to amend paragraphs 19, 21.5 to 21.6, 26 and 36 of its plea is dismissed.
3. The applicant is liable to pay the costs on scale C.

JUDGMENT

Daniso, J

- [1] The applicant as defendant seeks the amendment of its plea incorporating special pleas and a counterclaim filed in resistance of the action instituted by the respondent as plaintiff for an unpaid invoice in the amount of R2 903 599.41 relating to the services rendered by the respondent in terms of a service level agreement concluded between the parties on 16 January 2023.
- [2] For the sake of convenience I shall refer to the parties as they are referred to in the action.

- [3] The agreement and its terms are not disputed. It is also not in dispute that the defendant terminated the plaintiff's services with effect on 30 November 2023 on the grounds of tender irregularities and upon receipt of the invoice. The defendant made an undertaking to pay the invoice albeit on condition that the plaintiff provided proof of payment of its erstwhile employees' salaries who have since been absorbed by the current service providers.¹
- [4] The defendant's current plea raises two special pleas and a claim in reconvention. In the special pleas, the defendant seeks the dismissal of the plaintiff's claim on the grounds of non-compliance with the provisions of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002 (The Act) in that, prior to instituting the legal proceedings, the plaintiff failed to serve the defendant with a notice of its intention to institute legal as contemplated in section 3(1)(a) and a notice as provided for in s 4(1)(b) of the Act. The plaintiff also failed the institute these proceedings in terms of 5(1) of the Act.
- [5] In respect of the merits, the defendant avers that the plaintiff had previously claimed and was paid for inflated and/or fraudulent invoices and it is on that account that the defendant's plea incorporates a claim in reconvention for the recovery of the amounts totalling R5 184 099.87 for undue/overpayments of fabricated and/or fraudulent invoices that the plaintiff rendered for the months January to October 2023 (claim A) and November 2023 (claim B), including salaries of the plaintiff's erstwhile employees paid by the defendant in the amount of R1.5million (claim C). In applying the principle of set-off, the plaintiff remains indebted to the defendant in the amount of R2 571 510.11. The acknowledgement of debt is disputed on the grounds that the letter was written before the defendant had discovered the discrepancies in the plaintiff's invoices.

¹ Annexure "B" of the plaintiff's declaration is a copy of the defendant's letter dated on 14 December 2023.

- [6] The plaintiff objected to the plea and raised an exception contending that the special pleas are unsustainable as the provisions of the Act are not applicable to contractual claims, the plea does not disclose a defence and no cause of action has been set out in the counterclaim.
- [7] Following the exception, the defendant launched an application to amend its plea in terms of which the defendant essentially withdrew the special pleas and sought to address the plaintiff's objections directed at the remainder of the plea on the merits paragraphs 19, 21.5, 21.6, 26, 35, 36 and the claim in reconvention paragraphs, 39, 42 and 88 as follows:

"AD PLEA ON THE MERITS:

2.

By deleting the full stop punctuation mark in paragraph 19 of the Plea and replace it by a comma after the words "November 2023" and there and then add the following words:

'the rest of the contents hereof are denied. The defendant avers that over and above the services which the plaintiff claimed payment for, there are claims for services allegedly rendered by the plaintiff which were not sanctioned by the parties' agreement nor authorized by the defendant; such as providing public safety drivers, providing security at George pump site, snooker pump site, clinic pump site extra four security guards at Zamdela Stadium whereas no guards were deployed at all, claim for four guards at Harry Gwala pump station whereas only two were deployed, Anker Hof flats and Basement Gate.'

3.

By deleting paragraphs 21.5 and 21.6 entirely, and there and then substitute same with the following:

21.5 *The defendant avers that the plaintiff is not entitled of the money claimed in his summons in the amount R 2 903 599.41 or any portion thereof on the basis that the plaintiff's invoice for November 2023, like all previous invoices, is inflated and/or fraudulent.*

21.6 *In the premises, the defendant will invoke the principle set-off to recover the money paid to the plaintiff on the inflated invoices or fraudulent claims and/ or*

has enriched the plaintiff unjustifiably. In the alternative, the defendant will institute a conditional counterclaim or claim reconvention only in the event it may be found that the set-off amount is not a liquidated amount or liquid debt capable of being claimed by set-off.

"21.7 The defendant further avers in terms of rule 22 (4) of the uniform rules of this honourable court that the defendant has instituted a conditional claim reconvention against the plaintiff arising from the parties' agreement herein.

"21.8 The defendant avers that on the giving of judgment on the defendant's conditional claim reconvention, the plaintiff's claim will be extinguished either in whole or in part by the aforesaid claim in reconvention.

"21.9 The defendant will pray and / or request that judgment in the plaintiff's main action against the defendant herein be stayed or postponed sine die until final determination of the conditional claim in reconvention or judgment in the said conditional claim reconvention is delivered.

4.

By remembering the existing paragraph 26 as the new paragraph 26.1.

5.

By adding a new paragraph 26.2 with the following words:

'26.2 Therefore, the defendant avers that the defendant has not acknowledged its liability to pay the invoiced amount claimed in the summons. Any such perceived acknowledgement of liability was based on fraudulent or inflated invoice, which is illegal to pay.'

6.

By deleting existing paragraph 36 in its entirety.

7.

By inserting new paragraphs 35, 36, 37 and 38 just above the existing paragraph 35, but below the existing paragraph 34, with the following words:

35. *The defendant admits that the defendant was indebted to the plaintiff for services rendered in terms of the contract between the parties for the period of November 2023, which is in the amount R2 571 510. 11 (two million five hundred and seventy-one thousand five hundred and ten rand eleven cents) on the grounds stated above.*
36. *Defendant pleads, however, that its indebtedness towards plaintiff was extinguished by set-off on the facts stated above.*
37. *The defendant therefore prays that the plaintiff's claim be dismissed with costs on attorney and client scale including costs of two counsel.*
38. *Alternatively, the defendant prays that judgment on the plaintiff's claim must be postponed indefinitely until such time there is a final determination or judgment on the defendant's conditional claim in reconvention.'*

8.

By renumbering the existing paragraph 35 to be the new paragraph 39, and the existing paragraph 37 to be the new 40; thereafter, all the subsequent paragraphs to be renumbered accordingly.

AD CLAIM IN RECONVENTION:

9.

*By inserting the words **CONDITIONAL**, just before "CLAIM" in the existing heading of the CLAIM IN RECONVENTION.*

10.

*By inserting a preamble to the **CONDITIONAL CLAIM IN RECONVENTION**, just above the existing paragraph 39, with the following words:*

'The defendant's claim in convention is conditional only in the event of this honourable court finding that the defendant's set-off, either in whole or in part, is not based on a liquid debt or liquidated amount which is capable of prompt ascertainment, or its money

value has been ascertained, which the defendant persists on, but in that eventuality, the defendant's claim in reconvention shall take effect.'

11.

By inserting the following new subsequent paragraph just after the existing paragraph 42, but above the existing paragraph 43, whose numbering will follow the sequence suggested above, in the following words:

43. *Upon being presented with the invoices for the period from January 2023 to October 2023, the defendant effected payments of the aforesaid invoices in the total amount of R3 200 877.26 (Three million two hundred thousand eight hundred and seventy-seven cents).*

12.

By inserting the following 4 new subsequent paragraphs just after the existing paragraph 88, but above the existing paragraph the words "CLAIM B", whose numbering will follow the sequence suggested above, in the following words:

89. *It is common cause that the plaintiff and the defendant have entered into a service level agreement as stated and pleaded above by both parties.*
90. *In the bona fide and reasonable belief that the plaintiff has submitted accurate and reliable invoices for the services rendered from January 2023 to October 2023, the defendant effected payments of all the invoices for the aforesaid period.*
91. *The aforesaid amount paid to the plaintiff as aforesaid was not entirely owing nor due to the plaintiff on the bases that the aforesaid claims by the plaintiff were inflated or fraudulent or for services never rendered and/ or for services rendered without authorization by either the parties' contract.*

92. *The plaintiff has nevertheless appropriated the aforesaid money paid to the plaintiff by the defendant.*

93. *WHEREFORE the defendant claims for the repayment of the inflated amount for services not rendered and/ or for services rendered without the sanction of the parties' contract herein."*

[8] According to the defendant, the amendments are intended to clarify that the plaintiff is disentitled to the payment it seeks as the defendant's indebtedness towards the plaintiff was extinguished by set-off of the plaintiff's debt towards the defendant arising from the payments that the plaintiff received based on fraudulent and inflated invoices. The proposed amendment of the claim in reconvention is to assert the defendant's conditional claim in reconvention for the recovery of a large sum of money which should not have been paid to the plaintiff. The defendant contends that there is a genuine dispute regarding the facts giving rise to the nature and/or quantification of the plaintiff's claim and without clarity on this dispute the plaintiff's claim cannot stand in law, accordingly, the amendment of the plea ought to be granted with costs in favour of the defendant on attorney and client scale.

[9] The plaintiff objects to the amendment on the grounds that the proposed amendments remain excipiable. It is the plaintiff's case that the plea does not constitute a defence as the defendant seeks to set-off the plaintiff's contractual debt by relying on an unliquidated damages debt arising from undue payments, set-off is not applicable to unliquidated debts. The plaintiff contends that the conditional claim in reconvention does not state upon which legal basis is the defendant entitled to reclaim the amount it allegedly paid as salaries to the plaintiff's former employees and, except to make general averments regarding defendant's entitlement to reclaim undue payments, the averments that would sustain such a claim are not set out in the plea. Based on these reasons, the amendments sought by the defendant will lead to the plaintiff filing a formal exception which will no doubt lead to the striking out application of the amended

plea and counter claim at an additional costs for all the parties. The application ought to be dismissed with costs on scale C.

- [10] The principle applicable in the determination of applications of this nature are trite: an application to amend a pleading will be granted unless it is motivated by mala fides or it would cause an injustice to the other party which prejudice cannot be alleviated by an appropriate costs order.² Significant with the determination of this application is whether the amendment will render the pleading excipiable thus susceptible to be struck out.
- [11] Set-off extinguishes reciprocal liquidated debts capable of speedy and easy proof involving same parties and in their same capacities.³ On the facts germane to this matter, the plaintiff's claim against the defendant is for a liquidated debt. It arises from the defendant's obligation to pay the invoice in terms of the agreement and its money value has been ascertained whereas, the defendant's claim asserted in the proposed amendment does not involve a liquidated debt as it arises from "unjustly" payments made to the plaintiff without any legal obligation. A claim based on unjustified payments resorts under a damages claim of which its money value is not capable of speedy and easy proof, the plaintiff's debt is thus not compatible to the defendant's debt. Set-off does not apply to illiquid and incompatible debts.⁴ It would be unsound to allow an amendment that will render a plea excipiable as it will be struck out thereby prejudicing the plaintiff in the further conduct of its case.⁵ The objection to the proposed amendments directed at the plea on the merits is this decided in favour of the plaintiff.
- [12] Turning to the proposed amendments of the claim in reconvention (claim A and B). It is trite that a mutual debt which cannot be set-off due to its incompatibility to the plaintiff's claim can be asserted in reconvention.⁶ I do not detect any

² Uniform rule 28(10); *Moolman v Estate Moolman* **1927 (CPD)** 27 at 29; *Trans-Drakensburg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd* **1967(3) SA 632** (D) at 639.

³ *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 at 289; *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* **2010 (4) SA 232** (SCA) Para 14-15; Christie's *The Law of Contract in South Africa*, 8 ed p 577 at 12.3.2.

⁴ *Botha v W Swanson & Company (Pty) Ltd* **1968 (2) PH F85** CPD.

⁵ *De Klerk and Another v Du Plessis and Others* **1995 (2) SA 40** TPD at 431-44A.

⁶ Uniform rule 22(4).

deficiencies in the proposed amendments. The essential pre-requisites which must be pleaded in an enrichment action are present namely that, the defendant has been impoverished by having made payments to the plaintiff in the bona fide belief that the payment was due whereas it was not due as the invoices related to services which were not rendered or were rendered outside the scope of the agreement without the defendant's authorization. The plaintiff was enriched by the underpayments at the expense of the defendant. I hold that the conditional claim in reconvention does sustain a clear cause of action,⁷ the objection to the proposed amendments is dismissed.

- [13] The defendant has made no attempt to address the plaintiff's objections against the defendant's claim (claim C) for reimbursement of the salaries paid to the plaintiff's employees. Nevertheless, the plaintiff's liability to pay its former employees' salaries arises from a contract of employment. In the instant matter, there is no legal basis that has been proffered by the defendant for foisting itself into the contract concluded between the plaintiff and its former employees. The amendment would be unsound.

COSTS

- [14] The plaintiff has substantially succeeded with its opposition. The plaintiff is accordingly entitled to the costs.

ORDER

- (1) The applicant is granted leave to amend paragraphs 1 to 7 of its plea and paragraphs 39, 42 and 88 of its claim in reconvention within ten (10) days of this order.

⁷ *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA).

(2) Leave to amend paragraphs 19, 21.5 to 21.6, 26 and 36 of the applicant's plea is dismissed.

(3) The applicant is liable to pay the costs on scale C.

The Honourable Justice
2024 - 10 - 25
N.S. Daniso
NS DANISO, J

APPEARANCES:

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