

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 048403/2023

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED YES/~~NO~~

[Redacted Signature]

SIGNATURE

DATE: 10 October 2025

In the matter between:

Omnigo (Pty) Ltd

Plaintiff (applicant)

and

Sefeko (Pty) Ltd

Defendant (respondent)

JUDGMENT

P.A. SWANEPOEL, AJ

[1] This is an opposed application wherein the applicant applies for leave to amend its particulars of claim. The applicant is the plaintiff and the respondent the defendant in the action.

[2] The applicant's undated particulars of claim was attached to its combined summons dated 22 May 2023. The applicant is a company specialising in the manufacturing of amongst others electronic devices in accordance with the designs and specifications provided to it by its customers and the defendant is a company that commissions the manufacturing of electronic monitoring devices for which it provides the designs and specifications to the manufacturer and which are rented out to its customers and utilised to digitize guard scheduling and patrol monitoring.

[3] It is not disputed that the applicant and respondent (as supplier and customer respectively) concluded a Manufacturing Service Agreement during July 2020 ("the Agreement"), read with the quotations and purchase orders pleaded by the applicant (as plaintiff, in its existing particulars of claim under claim 1 and claim 2).

[4] In terms of the Agreement, the applicant (as supplier) and the respondent (as customer) agreed that the applicant would procure the required components for the manufacturing of handsets (in terms of the first purchase order pleaded by the applicant) for delivery to the defendant, and the manufacturing by the applicant of what is referred to as "Combo Chargers" for delivery by the applicant to the respondent (in terms of the second purchase order).

[5] The case pleaded by the applicant in its first claim included pleading to the effect that the respondent, on 25 November 2022, "*rendered written termination of* (the first pleaded purchase order) *with immediate effect*" to the applicant.

[6] In respect of its first claim the applicant pleaded in its existing particulars of claim that the respondent cancelled the first-mentioned purchase order without a tender for cancellation charges as contemplated in clause 10.6 of the Agreement. The applicant pleaded that the respondent is in breach of the Agreement and that the applicant is entitled to claim payment of the cancellation charges in terms of the Agreement. In addition, the applicant pleaded in paragraph 23 that it informed the

respondent (as defendant) on 16 February 2023 that the applicant terminates the Agreement and it demanded payment of said cancellation charges. The applicant then pleaded that it has suffered damages in the amount of R10 924 494.00, made up with reference to receipt of materials and partial manufacturing of 1000 handset units; receipt of materials for the manufacturing of 1000 units and receipt of 95% of the material for the manufacturing of 1000 units, totaling the aforesaid amount.

[7] In respect of its second claim, the applicant pleaded in its existing particulars of claim that pursuant to a quotation provided by it to the respondent a purchaser order came about in respect of the manufacturing of the Combo Chargers in the amount of R497 553.93) and a subsequent (third) purchase order in terms whereof the applicant was to manufacture and provide the respondent with *“Power Harness Assy (material & labour)”* in the amount of R18 929.27.

[8] In respect of its second claim, the applicant pleaded that it duly performed in respect of the second and third purchase orders. The applicant pleaded its aforesaid cancellation of the Agreement and demanded payment from the respondent in respect of *“Procurement and receipt of materials, and manufacturing of 426 complete products and/or units”* in the amount of R157 923.61 and *“Procurement and receipt of materials, and manufacturing of 350 complete products and/or units”* in the amount of R8 464.58 respectively.

[9] On 20 July 2024 the respondent served a *“Notice to Remove Causes of Complaint”* on the applicant in respect of the latter’s existing particulars of claim. Therein the respondent contended that the particulars of claim lacks averments necessary to sustain a cause of action, alternatively that it is vague and embarrassing.

[10] The affidavits in the interlocutory application for leave to amend the applicant’s particulars of claim, as well as the parties’ heads of argument are replete with references to the respondent’s aforesaid comprehensive Notice to Remove Causes of Complaint and its complaint, *inter alia*, that (according to the respondent) the applicant cannot claim damages from the respondent as a consequence of the former’s cancellation of the Agreement and further as a consequence of what the respondent refers to as a contractual agreement between the parties that neither one of the parties

shall have a claim for damages against the other pursuant to clauses 16.1 and 16.2 of the Agreement. The latter clauses contemplate that neither party shall be liable to the other for any loss of profit, loss of use, interruption or reduction of operation, loss of data, loss of production, loss of contracts or for any indirect or consequential damage that may be suffered by the other even if advised of the possibility of such damages and regardless of the form in which any action is brought. Of course, these allegations and adjudication on the correctness or not of the views of any of the parties in respect of the validity of the applicant's cause of action as contained in its existing particulars of claim and the respondent's contentions in that respect as contained in its aforesaid Notice of Remove Causes of Complaint, fall beyond the scope of adjudication of the present application.

[11] In its 8 August 2024 Notice of Intention to Amend, the applicant seeks to remove its existing particulars of claim and replacing it with a new particulars of claim referred to and annexed to the said notice, marked annexure "A".

[12] In the defendant's Notice of Objection to the applicant's proposed amendment, it is, amongst others, contended that the proposed amendment fails to cure objectionable matter raised by the respondent in an earlier notice of exception and notice of objection. Whether that is so falls beyond the scope of adjudication of the present application, suffice to say that such contention by the respondent does not in my view constitute a valid ground of objection against the applicant's proposed amendment.

[13] In addition, in the respondent's Notice of Objection to the proposed amendment, it is contended that the applicant "*may not vacillate, and may in particular not approbate and reprobate by on (sic) the one instance cancelling / terminating the underlying agreement and claim damages; and then later on rely upon the cancelled or terminated underlying agreement and claim specific performance (see in this regard inter alia, paragraph 23 of the proposed amendment) (cf. para 12 of the respondent's Notice of Objection to the proposed amendment).* In its Notice of Objection, the respondent contends that the applicant's earlier election (as pleaded in its existing particulars of claim) to cancel the Agreement, is in law final and that the applicant is

bound to such election and that therefore it is not open to the applicant to pursue a completely incompatible claim (that of , so it is alleged, specific performance).

[14] In the applicant's intended amended particulars of claim, conclusion by and between the parties of the written Agreement of 27 July 2020, is again pleaded.

[15] In its first claim the applicant intends to rely upon the same quotation and purchase order (first purchase order ending with numerals "038") as pleaded in its existing particulars of claim. The applicant does not, in its intended amended particulars of claim, repeat the allegation contained in its existing particulars of claim to the effect that, on 23 February 2023 the applicant informed the defendant that it terminates the Agreement and demanded payment of cancellation charges (*cf.* para 23 of the existing particulars of claim). Under the rubric of claim 1, in the applicant's intended amended particulars of claim, reference is made to the applicant's attorneys of record's letter of demand addressed to the respondent (annexure "C" attached to the intended amended particulars of claim, with a manuscript date inserted to be "16/6/2023"). In paragraph 8 of the letter of demand, it is stated that the applicant "... *herewith cancels the Manufacturing Service Agreement with immediate effect*". The quantum of the payment demanded in the letter is R11 956 554.95 and is designated to be "*damages*" suffered and made up of the purchase orders ending with numerals "323", "038" and "230". The monetary amount claimed in the applicant's intended amended particulars of claim, under claim 1, is R9 069 583.20.

[16] In its intended amended particulars of claim (*cf.* para 23) the applicant pleads that the respondent (as defendant) is in breach of the Agreement and that the applicant is entitled to claim specific performance for payment of purchaser order "038" as per clause 13.4 of the Agreement. The rubrics under which the aforesaid amount is claimed in the intended amended particulars of claim is that of receipt of materials and partial manufacturing of handset units and receipt of materials for the manufacturing of units, less what is pleaded to be "*labour cost not incurred*". In the intended amended particulars of claim, under applicant's claim 1, reliance is in the first instance pleaded to be on the provisions of clause 13.4 of the Agreement, which provide:

“Nothing in this clause 13 shall prevent a party from claiming specific performance in terms of the contract or damages for any breach, or from terminating the Agreement by written notice with immediate effect for any material breach of contract.”

[17] The wording of the subclauses of clause 13 of the Agreement is to an extent peculiar as it provides in clause 13.1 that, in the event of either party failing to remedy any breach of the contract within a stipulated number of days pursuant to a written request by the other party to do so, the innocent party may without prejudice *“to any of its rights in terms of the Agreement or in law, cancel the Agreement by written notice with immediate effect, with or without claiming damages”*. Clause 13.3 provides that *“[t]hen the other Party may terminate the Agreement on written notice with immediate effect”*. I say that the wording of the subclauses aforementioned are peculiar, because it purports to provide for cancellation without limitation of the rights of a party as contained in the Agreement itself.

[18] Under the rubric of claim 2 contained in the applicant's intended amended particulars of claim, reliance is placed on the purchase order ending with numerals *“230”* in respect of the same quantum for manufacturing of *“Combo Chargers”* as that contained in claim 2 of the applicant's existing particulars of claim. Similarly claim 2 in the applicant's intended amended particulars of claim contains pleading of the purchase order ending with numerals *“323”* in respect of the *“Power Harness Assy material”* and for the same quantum, namely R18 929.27 as contained in the applicant's existing particulars of claim.

[19] In paragraph 38 of the applicant's intended amended particulars of claim it is pleaded that, in accordance with clause 13.4 of the Agreement, the applicant is entitled to terminate the Agreement by written notice with immediate effect.

[20] I now turn to consider the general principles applicable to applications for amendment of pleadings. Uniform Rule 28 regulates the amendment to pleadings and documents. It is trite that a court hearing an application for an amendment of a pleading has a discretion whether or not to grant it, which is a discretion that must be exercised judicially.¹ In *Apex* it was *inter alia* held that:

“[T]he aim of the court is to do justice between the parties. In the context of amendments, mistake or neglect on the part of one of the parties ought not to stand in the way of ventilating and deciding the real issues between the parties, necessity for the amendment having arisen through some reasonable cause. Nevertheless, all amendments must be bona fide, and the court will, always, as a further essential consideration in the exercise of its discretion, examine any prejudice or injustice that the other party may suffer if the amendment is granted, which prejudice cannot be compensated for by a suitable order as to costs, and, where appropriate, a postponement.”²

[21] In *Macsteel Tube & Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd*³ it was held that:

“It is trite that applications for amendment of pleadings are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes. Furthermore, 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 of costs, or “unless the parties cannot be put back for the purpose of justice in the same position as they were when the pleading which is sought to be amended was filed”. The regional court’s exercise of its discretion is evident from the following passage in its judgment:

¹ See *Apex Truck & Tractor v PPCF Boerdery CC* 2024 JDR 2028 (GJ) at para [7]

² See *Apex* judgment, para [8] at pp 4 -5; and see further, confirmation therein of the correctness of the principle that the primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties and to determine the real issues between them.

³ Unreported decision by the Supreme Court of Appeal, neutral citation *Macsteel Tube & Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* (680/2020) [2021] ZASCA 178 (17 December 2021) at para [24]

‘The granting [or] refusing of an amendment is a matter of the Courts discretion and of course it must be applied judiciously. The tendency in Courts has generally been to allow an amendment if it can be done with no prejudice to the other side and it is true that the Courts approach applications in terms of rule 55(a), a little bit more charitably.’⁴

[22] It is accepted law that the power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent. See in this regard the judgment by the Supreme Court of Appeal in *Media 24 (Pty) Ltd v Nhleko and another*⁵ where it was stated thus:

“In coming to its conclusion to refuse the application for amendment, the High Court paid scant regard to the purpose of pleadings, which is to define the issues between the parties. Because the primary role of pleadings is to ensure that the real dispute between litigants is to be adjudicated upon, courts are loathe to deny parties the right to amend their pleadings, sometimes right up until judgment is granted. An exception is made when the amendment is mala fides or will result in an injustice which cannot be cured by a costs order. Thus, the power of a court to refuse amendments is confined to considerations of prejudice or injustice to the opponent.”⁶

[23] I now turn to consider the respondent’s grounds of objection to the applicant’s application for amendment of its particulars of claim.

[24] I have hereinabove stated that, in my view, the respondent’s complaint that the applicant’s intended amended particulars of claim fails to remove all the causes of complaint as raised in the respondent’s Notice of Exception and Notice of Objection, does not constitute (considered on its own) a valid ground of objection to the intended

⁴ References in the quoted part not repeated

⁵ 2023 JDR 1782 (SCA) at para [16]

⁶ Footnote reference in the quoted part not repeated

amendment. It is rather the specific particularised grounds of objection that must be considered as part of the adjudication of the present application.

[25] I am not impressed by the respondent's ground of objection where it is stated that "... *the Plaintiff may not vacillate, and may in particular not approbate and reprobate by on the one instance [sic] cancelling / terminating the underlying agreement and claim damages; and then later on rely upon the cancelled or terminated underlying agreement and claim specific performance (see in this regard inter alia, paragraph 23 of the proposed amendment).*" A reading of that which is pleaded under claim 1 of the applicant's intended amended particulars of claim reveals that the plaintiff has comprehensively pleaded those clauses contained in the Agreement pursuant to which it contends to be entitled to claim the payment that it does, despite its asserted cancellation of the Agreement, limited to the particular captions under which the total amount of payment is made up. There is, evidently, no vacillation and/or approbation and reprobation, as asserted by the respondent, if regard is had to the applicant's intended amended particulars of claim compared to its existing particulars of claim.

[26] As part of the respondent's grounds of objection it repeats the contention that the applicant "*appreciates*" and/or accepts the correctness and import of the respondent's exception and Notice of Objection as well as the contention that it (the applicant) "... *cannot recover the damages which it purports to recover, the Plaintiff apparently resolves to steer its action in the proposed amendment in a completely opposite direction*". In my view the respondent's assertion that the applicant has accepted the correctness and/or validity and/or import of the respondent's prior exception and objection to the content of the existing particulars of claim, cannot (and does not, on a standalone basis) serve as a valid ground of objection to the intended amendment.

[27] Despite the manner in which paragraph 23 of the applicant's intended amended particulars of claim is worded and despite the pleaded cancellation by the applicant of the written Agreement concluded by and between the parties, I am not convinced (if regard is had to the content of the intended amended particulars of claim and the

particular manner in which the pleading is worded) that what the applicant intends to claim constitutes specific performance in terms of the (cancelled) Agreement.

[28] Even if I am wrong in this regard, it would be open to the respondent (as defendant) to deliver a plea or exception in response to the amended particulars of claim. Thus, in my view, the respondent cannot validly assert that it would be prejudiced or that it will suffer any injustice should the application for amendment be granted.

[29] As regards the respondent's contention that the proposed amendment "*lacks bona fides on the part of the Plaintiff*", there is no truth in the respondent's contention that, pursuant to its earlier exception against the applicant's claim, the intended amended particulars of claim contains the pretention that the Agreement has not been cancelled. To the contrary, as indicated above, it remains part of what is pleaded in the intended amended particulars of claim that the applicant (as plaintiff) asserts cancellation by it of the Agreement.

[30] Insofar as it concerns the respondent's contention that clause 16.2 of the Agreement is to the effect that neither party's aggregate liability to the other for any claim or claims for damages out of or in connection with any cause arising from the Agreement will exceed 100% of the value of the goods and services, and that the applicant's intended amended particulars of claim pursues a claim based upon specific performance which falls squarely under clause 16.2 of the Agreement, I disagree with the respondent's contention that the applicant was obliged to plead that its damages accords with the limitation contained in clause 16.2 of the Agreement. Manifestly, the respondent failed to, as part of its grounds of objection to the intended amendment, plead that the manner in which the applicant's case is pleaded in its intended amended particulars of claim constitutes a transgression of the asserted limitation contained in clause 16.2 of the Agreement. However, even if I am wrong in this respect, it remains that it would be open to the respondent (as defendant) to plead to and/or take exception against the plaintiff's amended particulars of claim. I find that the respondent cannot be said to be prejudiced and cannot validly assert *mala fides* on the side of the applicant, and furthermore cannot be heard to say that it would suffer an injustice if the amendment is to be granted.

[31] Lastly, as regards the respondent's contention that claim 1 (as formulated in the proposed amended particulars of claim) is incompatible with claim 2 on the basis that specific performance is sought in claim 1, I find the complaint implausible. As already stated hereinabove, I am of the view that the manner in which claim 1 is pleaded by the applicant in its intended amended particulars of claim does not give rise to a claim of specific performance in terms of the Agreement.

[32] In the circumstances, and in the exercise of my discretion, I am of the view that a proper ventilation of the dispute between the parties ought to be allowed and that the amendment ought to be granted.

[33] It is also necessary to refer to the applicant's alternative prayer as contained in its Notice of Application for Leave to Amend dated 19 September 2024. My finding that there is no reason why the application for amendment by the applicant of its particulars of claim should not be granted renders consideration of the alternative relief unnecessary. I specifically make no finding on the appropriateness of the manner in which the applicant sought to seek an amendment of its Notice for Leave to Amend.

[34] There is in my view no reason why costs should not follow the event. I am, however, of the opinion that the costs of two counsel should not be allowed.

Order

In the circumstances I grant an order in the following terms:

1. The applicant's application for amendment of its particulars of claim is granted in the terms set out in prayer 1 of the applicant's Notice for Leave to Amend in terms of Rule 28(4) dated 19 September 2024.
2. The respondent is ordered to pay the applicant's costs in respect of the opposed application for amendment. The scale of fees contemplated by subrule (3) of Uniform Rule 67A shall be Scale C, as contemplated in Uniform Rule 69(7).


P.A. SWANEPOEL

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

This judgment was handed down electronically by circulating to the parties and/or the parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 17h45 on 10 October 2025.

Date of hearing : **05 May 2025**

Date of judgment : **10 October 2025**

Appearances:

Counsel for applicant : M Snyman SC

H Worthington

Attorneys for applicant : Jordaan & Smit Inc.

Counsel for respondent : MP van der Merwe SC

J Eastes

Attorneys for respondent : Morné Coetzee Attorneys