



**SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)**

**CASE NO: 2013/9610**

- (1) REPORTABLE: YES / ☒ NO  
(2) OF INTEREST TO OTHER JUDGES: YES / ☒ NO  
(3) REVISED: 19/08/2013

16/08/2013

*Modiba*

In the matter between:

**JSS INDUSTRIAL COATINGS CC**

**(Registration Number: 2006/046333/23)**

**PLAINTIFF**

**And**

**INYATSI CONSTRUCTION (SOUTH AFRICA) (PTY) LTD**

**DEFENDANT**

**(Registration Number: 2007/006240/07)**

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**JUDGMENT**

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**MODIBA AJ:**

[1] This is an application to amend the Plaintiff's particulars of claim in terms of Rule 28(4).

[2] On 16 August 2013 I granted an order allowing the Plaintiff to amend its particulars of claim. I indicated that the reasons for the order would follow. These are the reasons.

[3] The Applicant who is the Plaintiff in the main action instituted action against the Respondent, who is the Defendant in the main action on 18 March 2013. In this judgment I refer to the parties as referred to in the main action.

[4] The Plaintiff's action is for damages for breach of contract. The Defendant filed a notice of intention to defend on 4 April 2013.<sup>1</sup> The Defendant excepted to the Plaintiff's particulars of claim for being vague and embarrassing. The exception was granted by Thompson AJ on 27 July 2013. The Plaintiff filed a notice to amend its particulars of claim dated 3 July 2013, in order to comply with the order by Thompson AJ. The Defendant filed an objection to the Plaintiff's intended amendments to its particulars of claim dated 15 July 2013. The Plaintiff then filed this application on 26 July 2013.

[5] In adjudicating this application, I am guided by two sets of principles which I have articulated below, namely principles relating to pleadings; and general principles relating to the amendment of pleadings.

[6] The purpose of pleadings is to allow parties to define issues that are material to their dispute. Each party is required to set out in its pleadings a clear and concise statement of the material facts upon which it seeks to rely for its claim with sufficient

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<sup>1</sup> The Defendant took other steps in these proceedings. I however do not refer to these steps in this judgment as I do not consider such steps pertinent for the adjudication of the current application.

particularity to enable its opponent to reply thereto.<sup>2</sup> Not all allegations that are relevant to the dispute between the parties ought to be pleaded. For purposes of determining the allegations the parties ought to plead, it is important to draw a distinction between *facta probanda* and *facta probantia*. In *McKenzie v Farmers' Co-operative Meat Industries Ltd*,<sup>3</sup> the Appellate Division defined *facta probanda* as:

*'Every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'*

[7] *Facta probantia* on the other hand, are facts that are related to the *facta probanda* and are necessary to prove the *facta probanda*.<sup>4</sup> Put differently, *facta probantia* are different pieces of evidence that must be led in order to prove the *facta probanda*. It is trite that only *facta probanda* must be pleaded. *Factor probantia* are led as evidence during trial. The Defendant responds to the allegations set out in the particulars of claim by filing a plea admitting, confessing, denying or avoiding the material facts contained in the Plaintiff's particulars of claim.<sup>5</sup>

[8] Rule 28 allows the parties the opportunity to amend their pleadings after their pleadings have been filed. An amendment to pleadings is intended to give parties an opportunity to improve the manner in which they have defined material facts in their pleadings, to completely change the material facts or even a cause of action. It is for this reason that the court will usually lean in favour of granting the proposed amendment.<sup>6</sup>

[9] The onus is on the party seeking the amendment to show that the amendment should be granted.

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<sup>2</sup> Rule 18 (4).

<sup>3</sup> 1922 AD 16 at 23. See also *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 658A.

<sup>4</sup> *Inzinger v Hofmeyr & Others* [2010] JOL 26423 (GSJ) at para 16

<sup>5</sup> Rule 22.

<sup>6</sup> *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 547

[10] In granting an amendment application, the court is guided by the following considerations:

10.1 the applicant has made an application to amend its pleadings as prescribed by Rule 6(11);

10.2 applicant has brought the application in good faith;<sup>7</sup>

10.3 the other parties should not be prejudiced in a manner that cannot be remedied by an order for a postponement of the proceedings if necessary and costs against the party seeking the amendment. The gravity of the onus on the party seeking the amendment increases with the extent of the inconvenience and dislocation caused to the other parties;<sup>8</sup>

10.4 the court may not grant an amendment which would render the pleadings excipiable.<sup>9</sup>

[11] The essence of the Defendant's objection to the Plaintiff's particulars of claim is threefold; firstly that the Plaintiff failed to plead certain facts, secondly that the particulars of claim do not comply with Rule 18(6) in that the Plaintiff failed to attach contractual document(s) that form the basis of its claim and thirdly, that the intended amendments are vague and embarrassing and therefore excipiable. Some of the grounds of objection raised by the Defendant are repetitive but different reasons are advanced for each ground. I deal with all the grounds of objections raised by the Defendant.

[12] I now turn to consider the Defendant's grounds of objection.

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<sup>7</sup> *Moolman v Estate Moolman* 1927 CPD 27 at 29

<sup>8</sup> *Ciba-Geigy (Pty) Ltd v Sushof Farms (Pty) Ltd* 2002 (2) SA 447 (A) at 463E

<sup>9</sup> See *Cross v Ferreira* 1951 (2) SA 443 (C) at 449G and 450E-F

### Ground 1

[13] In the intended paragraph 5 of the Plaintiff's particulars of claim, the Plaintiff pleads that the contract between the parties came into existence when a certain Jabu Ndlovu accepted a quotation attached to the particulars of claim as "POC1" by means of a letter attached to particulars of claim as "POC2." The Defendant objects to this amendment on the basis that the Plaintiff failed to allege where and when Mr. Jabu allegedly accepted the quotation, how the letter of appointment was presented to the Plaintiff at its place of business, when the presentation of the letter took place, who presented the letter on behalf of the Plaintiff, and who accepted the letter on behalf of the Defendant.

[14] The particulars to be set out by the Plaintiff in a contractual claim are regulated by Rule 18(6). This rule requires the Plaintiff to state whether the contract is oral or written, when, where and by whom the contract was concluded and to attach a copy of the contract if there is a written contract.

[15] I am of the view that the intended paragraph 5 read with the new paragraphs 4 and 6 of the Plaintiff's particulars of claim complies with Rule 18(6) in that it is clear from the allegations contained in these paragraphs that the contract between the parties is a written contract, that the contract was concluded on or about 19 March 2012, at the Plaintiff's principal place of business, that the contract was concluded between the Plaintiff and the Defendant and that the Plaintiff was represented by Jason Steyn whilst the Defendant was represented by Jabu Ndlovu. I am of the further view that it is not necessary for the Plaintiff to allege in its particulars of claim how the presentation took place as this allegation is not material. The allegation is only of evidentiary value for purposes of proving that the presentation did take place. Put differently, the allegation is *facta probantia* and does not have to be pleaded. If the Defendant denies that the presentation did take place, it is at liberty to plead accordingly in its plea and to call upon the Plaintiff to prove this allegation. Therefore this objection stands to fail.

## Ground 2

[16] The Defendant alleges that the Plaintiff pleaded in the intended paragraph 8 of its particulars of claim that the contract is regulated by the terms and conditions of the quotation set out in "POC1" and documents referred to in "POC2"; namely, the Principal Contract documentation, Bill of Quantities, Subcontract Agreement January 2008 Edition, and Special Conditions of Contract. The Defendant further alleges that the Plaintiff failed to attach the latter documents.

[17] Counsel for the Plaintiff argued that the Plaintiff does not intend to rely on the contractual documents that it did not attach to the Particulars of claim.

[18] In *Vorster v Herselman* 1982 (4) SA 857 (O), it was held that only the parts of a contract sought to be relied on by the Plaintiff need to be attached to its particulars of claim. I am of the view that failure by the Plaintiff to attach additional contractual documents does not contravene Rule 18(6). In *Steyn NO v Standard Trading Co Ltd* 1995 (3) SA 423 (A) at 429, the Appellate Division held that when a Plaintiff bases its cause of action on a document and annexes part of that document, the Defendant is entitled to assume that the Plaintiff will rely on the annexed portion only. I am also of the view that failure by the Plaintiff to attach additional contractual documents that it does not intend to rely on at the trial is not prejudicial to the Defendant. Therefore Plaintiff's particulars of claim are in compliance with Rule 18(6) insofar as it has attached the contractual documents upon which it seeks to rely. Therefore this objection also stands to fail.

## Ground 3

[19] The Defendant alleges that "POC1" does not exist as it has been superseded by "POC2". Whether this document exists as alleged by the Plaintiff or does not exist as alleged by the Defendant raises the question whether a valid contract exists between the parties. This is a material dispute of fact to be determined by the trial court. Objecting to this amendment is not an appropriate step to take to address this

dispute. Again, if the Defendant denies that a valid contract exists between the parties, the appropriate step to take is to plead accordingly in its plea and to call upon the Plaintiff to prove this allegation. Therefore this objection stands also to fail.

#### Ground 4

[20] The Defendant objects to the new paragraph 9.1 to 9.6 of the particulars of claim on the basis that the Plaintiff intends to set out "the express, alternatively implied, further alternatively tacit material terms of the contract," and that the contents of paragraphs 9.1 and 9.6 emanates from "POC1" which has been superseded by "POC2" and therefore is no longer valid. The Defendant further alleges that the terms pleaded in paragraphs 9.2, 9.3 and 9.5 are not set out in either "POC1" or "POC2".

[21] This objection is valid in so far as it relates to the express material terms of the contract as these terms are not apparent on the contractual documents attached to the Plaintiff's notice of amendment. However, the objection does not go to the root of the relevant allegation as the Plaintiff has pleaded in the alternative implied contractual terms and in the further alternative, tacit contractual terms. These terms are not written and therefore do not have to be apparent on the attached contractual documents. As mentioned in paragraphs 17 of this judgment, I am of the view that the Plaintiff's particulars of claim comply with Rule 18(6) in that it has attached the contractual documents upon which it seeks to rely. Therefore this objection also stands to fail.

#### Ground 5

[22] In paragraph 3 of its notice of objection to the particulars of claim, the Defendant makes several submissions which in my view essentially challenge the validity of the alleged contract between the parties. The Defendant goes on to submit that based on its allegation that "POC1" does not exist, the Plaintiff's particulars of claim are vague and embarrassing and accordingly excipiable. As already stated in paragraph 19 of this judgment the question whether a valid contract exists between the parties

is a material dispute of fact to be determined by the trial court. The Defendant ought to respond to this allegation in its plea.

#### Ground 6

[23]. Lastly, the Defendant alleges that in the intended paragraph 5, the Plaintiff contradicts itself as to which party made the offer and which party accepted the offer and consequently how the contract was formed. As stated in paragraph 8 of this judgment it is clear from the intended amendment to paragraph 4 to 6 of the Plaintiff's particulars of claim, when, where and by whom the contract was concluded. These are the material facts that the Plaintiff is required to allege and prove in order to establish the existence of the contract between the parties. The facts relating to how the offer was accepted which the Defendant raises in paragraph 4 of its objection to the intended amendment are *facta probantia*. Failure by the Plaintiff to plead these facts does not render the Plaintiff's particulars of claim vague and embarrassing because it is not necessary for the Plaintiff to plead these facts.

[24] I am therefore of the view that the intended amendments to the Plaintiff's particulars of claim are not excipiable. These amendments are not mala fides as they are intended to remedy the Defendant's exception to the Plaintiff particulars of claim as per order granted by Thompson AJ on 29 July 2013. I am of the further view that the intended amendments are not prejudicial to the Defendant because the Defendant is yet to file its plea. I am also of the view that the Plaintiff has set out the intended paragraphs 4, 5, 6, 8 and 9 of its particulars of claim in sufficient detail to enable the Defendant to plead thereto.

[25] The Plaintiff's application to amend its particular of claim stands to succeed.

[26] I therefore make the following order:

1. The Plaintiff is granted leave to amend its particulars of claim dated 14 March 2013 as set out in the Plaintiff's Rule 28 Notice of Intention to Amend dated 3 July 2013.

2. The Defendant is ordered to pay the costs of this Application.

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**Modiba AJ**

Counsel for the Plaintiff:

Mr. H van Beek

Instructed by:

Paul Barnard Incorporated

Counsel for the Defendant:

Mr. du Toit Maritz

Instructed by:

D. J. Greyling Incorporated

Date of hearing: 13 August 2013

Date of Judgment: 16 August 2013

Revised Judgment: 19 August 2013