REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/ A5043

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

26/9/2014 .....
DATE

.....
SIGNATURE

In the matter between:

SIYATHENGA PROPERTIES ONE (PTY) LTD Appellant

(APPLICANT/ DFENDANT IN RECONVENTION A QUO)

and

NET 1 APPLIED TECHNOLOGIES SA LTD Respondent

(RESPONDENT/ PLAINTIFF IN RECONVENTION A QUO)

JUDGMENT

SUTHERLAND J:

Introduction

[1] This appeal is about whether an amendment to pleadings should be allowed.

[2] The plaintiff, the present appellant, sued the defendant on a lease agreement, which commenced on 1 December 2006 and terminated on 30 November 2011, for outstanding payments due. The defendant denied any indebtedness. The defendant counter-claimed on 15 June 2010, claiming payment of an installation allowance. The plaintiff filed a plea on 22 June 2010 denying it was obliged to pay because of failures by the defendant. On 19 April 2012, about two years later, the plaintiff served a notice to amend its plea to the counterclaim. The defendant objected.

[3] The general import of the controversial part of the Notice of Amendment was to do two things. First, to re-articulate the scope of a defence about the non-compliance by the defendant to perform certain obligations, and second, to introduce a new defence.

[4] Willis J, on 9 September 2012, upheld the objection on the grounds that the effect of the introduction of a new defence that the plaintiff was not the defendant's debtor in respect of its counterclaim, was inappropriate because it

constituted a withdrawal of an implied admission that the plaintiff was the defendant's debtor, but was excused from performance because of a default by the defendant, and left the defendant with a nugatory claim against the true debtor by reason of prescription. It is not obvious from the judgment that the first issue was addressed in the reasoning.

[5] After leave to appeal had been refused, a petition to the Supreme Court of Appeal was partially successful. Leave was granted to the Full Bench of the Gauteng Local Division on 19 June 2013. The SCA made an order in which the costs order in the application was set aside and ordered to be costs in the appeal. Furthermore, the SCA made an order formulated thus:

> 'The leave to appeal is limited to the following issues:
>
> Second proposed amendment relating to paragraph 5 of the plaintiff's plea to the defendants counterclaim'.

[6] It is controversial what this order means. Thus this judgment, addresses in turn, what is the proper interpretation of the SCA's order and then examines the issue referred to this court.

The pleadings

[7] To make sense of the controversy the various averments in the initial pleadings and the proposed amendments are set out.

The initial position

[8] In the plaintiff's original claim, the written lease agreement was common cause.

[9] The relevant portions of the counterclaim pleaded are these:

> "(3) *It was a term of the lease agreement concluded between the plaintiff and the defendant on or about 12 November 2007 and referred to in paragraph 3 of the plaintiff's particulars of claim that the defendant shall fit out the premises to suit the requirements of the defendant and the plaintiff shall contribute a VAT exclusive amount, not exceeding R1157988, to fit out the premises.'*
> (4) .....
> (5) *The defendant complied with all its obligations in terms of the lease agreement, as well as any preconditions in respect of the Plaintiff's obligation to contribute the amount aforementioned to fit out the premises, in so far as possible."*

[10] The plea to paragraph 3 was an unequivocal admission.

[11] The plea to para 5 reads thus:

> "*The contents hereof are denied as is specifically traversed and the Defendant is accordingly put to the proof thereof.*
>
> *5.1 In amplification of the aforegoing denial the Plaintiff pleads that it was specifically agreed that the Plaintiff would allow the Defendant 90 days from the lease commencement date to complete the tenant installation works and to issue to the Plaintiff a tax invoice for works so completed,*

failing which, the Defendant shall forfeit the entire fitting out allowance.

5.2 the Plaintiff pleads further that the Defendant failed to complete the fitting out of the leased premises and failed to issue the necessary invoice to the Plaintiff within the agreed 90 day period."

The proposed amendment

[12] The specific proposed amendment to para 5 of the plea reads:

"*5.1. The plaintiff denies each and every allegation contained therein as if specifically traversed and accordingly puts the defendant to the proof thereof.*

5.2. In amplification of the aforesaid denial, and without limiting the generality thereof, the plaintiff:

5.2.1. denies that the defendant complied with its payment obligations in terms of the lease agreement and repeats the content of paragraphs 5 and 6 of the plaintiff's particulars of claim;

5.2.2. denies that the defendant complied with its obligations and the preconditions relating to the fitting out allowance and repeats the content of paragraphs 3.2 to 3.23 above."

(The innovations are underlined)

[13] The part which is incorporated by reference, ie pars 3.2 – 3.23 can be divided as follows:

13.1. Paragraph 3.2 – 3.3 and 3.17 - 3.23 cites clause 12 of the lease which has a bearing on the initial plea averring a breach of the obligation by the defendant in failing to complete the installation and present an invoice within 90 days and regurgitates the substance of what was pleaded in the initial paragraphs 5.1 and 5.2 of the plea.

13.2. Paragraphs 3.4 – 3.16 introduce a new defence relying on clause 35 of the lease which provides that upon a sale of the property the new owner would assume the obligations of the plaintiff. (The merits of this averment are irrelevant for the purposes of this case.)

[14] The content of paragraph 3 is very long, perhaps unnecessarily so, but the coherence of this judgment compels its citation in full; it reads thus:

"*3.2. The defendant's counterclaim against the plaintiff is based upon the terms of Annexure "6.5" to the lease agreement ("Annexure "6.5""), the relevant terms of which state as follows :*

*"1. The Tenant shall fit out the premises to suit the requirements of the Tenant ("the Tenant's installation) and the Landlord shall contribute a VAT exclusive amount not exceeding **R1 157 988.00** to fit out the premises ("the fitting out allowance"). The fitting out allowance shall be paid to the Tenant by the Landlord on fulfillment of the conditions set out in 11 hereof.*

10. All the terms and conditions of this Agreement of Lease apply "mutatis mutandis" to the Tenant's allowance improvements.

11. Prior to the payment of the fitting out allowance by the Landlord to the Tenant;

11.1. all the above conditions will have been complied with;

11.2. *the Landlord will have inspected the Tenant's allowance and be satisfied with the Tenant's installation is of an acceptable standard; and*

11.3. *the Tenant will have issued the Landlord with invoices received from the contractors and/or consultants in respect of the Tenant's allowance together with proof that such invoices have been paid by the Tenant.*

11.4. *the Tenant will have issued the Landlord with a tax invoice for the amount of the fitting out allowance as determined in terms hereof.*

12. *The Landlord allows the Tenant 90 days from the lease commencement date to complete the Tenant installation works and to issue the Landlord a tax invoice for the works so completed, failing which, the Tenant shall forfeit the entire or remaining account (in the case of progress payments having been made) of the fitting out allowance."*

3.3. *The plaintiff refers to the remaining terms of Annexure "6.5" and pleads that same should be incorporated herein as if specifically pleaded.*

3.4. *In terms of clause 35 of the lease agreement:*

"35.1. Should the Landlord at any time, during the currency of this Lease, sell the Property to a third party ("the third party purchaser") the Tenant agrees –

35.1.1. *that it shall not, due to or arising out of the sale of the Property by the Landlord to the third party purchaser, be entitled to cancel this Lease and the Lease agreement shall remain of full force and effect and shall be binding on the Tenant, notwithstanding the sale of the Property to the third party purchaser;*

35.1.2. *and undertakes to fulfill all of its obligations under the Lease to the third party purchaser; and*

35.1.3. *that upon a sale referred to aforesaid, the Landlord shall be deemed to have ceded all of its rights and delegated all of its obligations under the Lease to the third party purchaser and the Tenant, by its signature hereto, shall be deemed to have consented to the cession and delegation referred to aforesaid."*

3.5. *The plaintiff pleads that each and every remaining term of the lease agreement be incorporated herein as if specifically pleaded.*

3.6. *On or about 16 November 2007, and at Parktown North alternatively*

Craighall, the plaintiff concluded an agreement of sale ("the sale agreement") in respect of the property, of which the premises forms part, with a third party purchaser, namely Buzz Trading 199 (Pty) Ltd ("the purchaser").

3.7. *At the time of concluding the sale agreement the plaintiff and the purchaser were duly represented.*

3.8. *A copy of the sale agreement, each and every term of which is to be incorporated herein as if specifically pleaded, is annexed hereto marked* ***"PP1"****.*

3.9. *The relevant terms of the sale agreement state as follows:*

"1.1. In this agreement the following words shall have the meanings assigned to them hereunder:

*1.1.1. "the seller" – **Siyathenga Properties One (Pty) Ltd** Registration No. 2004/005348/07, represented herein by Andre von Bulow, who warrants that he is authorized to do so by resolution of the Board of Directors;*

*1.1.2. "the purchaser" – **Buzz Trading 199 (Pty) Ltd** Registration No. 2007/021617/07, represented herein by Lance Chalwin-Milton, who warrants that he/they is/are authorized to do so by resolution of the Board of Directors;*

1.1.3. "the property" – the immovable property known as Erf 208 Rosebank Township, Province of Gauteng, measuring 6866m² and situated at Cnr Bolton Road, Hood Avenue and Jan Smuts Avenue Rosebank and registered in the name of the seller, and held under deeds of title number T30686/2005 together with all buildings and improvements thereon known as President Place, including fixtures and fittings forming part thereof (save to the extent that same are the property of any tenancy or other person claiming occupation of premises under any tenant).

1.1.6. "the transfer date" – the date of registration of transfer of the property into the name of the purchaser;

1.1.7. "the leases" – save to the extent cancelled or terminated for any reason prior to registration of transfer, all leases in respect of premises forming part of the property in terms of which the seller is

*the lessor as listed in **Annexure A** and all leases subsequently concluded by the seller prior to registration of transfer;*

1.1.8. "the tenants" – the tenants under the leases;

1.1.11. "the enterprise" – means the letting enterprise conducted by the seller in respect of the property, which includes :

1.1.11.1. the property;

1.1.11.2. all rights and obligations in terms of the leases;

1.1.11.3. the business agreements; and

1.1.11.4. any cash deposits given by the seller to any person under the business agreements or otherwise in respect of the property;

and which excludes any other assets or liabilities of the letting enterprise.

4.1. The seller hereby sells the enterprise to the purchaser, which hereby purchases the enterprise for the sum of R102 500 000.00 (One Hundred and Two Million Five Hundred Thousand Rand), which purchase price includes VAT at 0% (nil per centum), and upon the further terms and conditions set out in this agreement.

6.1. Possession of the enterprise shall be given to and taken by the purchaser on the transfer date, from which date the purchaser shall be entitled to every benefit and income arising from the property, from which date the property shall be held by the purchaser at its sole risk and the purchaser shall be responsible for and shall pay all rates and taxes and other expenses relating to the property."

3.10. All of the conditions contained in the sale agreement were duly fulfilled and the sale agreement came into full force and effect.

3.11. Transfer of the property from the plaintiff to the purchaser was duly registered on 25 June 2008 ("the date of transfer").

3.12. Accordingly, and from the date of transfer, the plaintiff was deemed to have delegated all of its obligations in terms of the lease agreement to the purchaser, including any obligation to make payment of the fitting out allowance referred to in Annexure "6.5".

3.13. *The defendant was duly informed of the sale of the property.*

3.14. *The defendant issued the plaintiff with the tax invoice as provided for in clause 11.4 of Annexure "6.5" on or about 3 October 2008.*

3.15. *At the time when the defendant issued the aforesaid invoice, any obligation on the plaintiff to make payment to the defendant had been delegated to the purchaser.*

3.16. *Accordingly the plaintiff is not liable to the defendant for payment in respect of the fitting out allowance as claimed or for any other amount whatsoever.*

In the event that it is found that the plaintiff's obligation to make payment to the defendant of the fitting out allowance as referred to in Annexure "6.5" was not delegated to the purchaser and the plaintiff remains liable to the defendant for such obligation, then and in that event the plaintiff pleads as follows :

3.17. *The plaintiff repeats paragraphs 3.2 and 3.3 above.*

3.18. *In terms of clause 12 of Annexure "6.5" the plaintiff provided the defendant with 90 days from the lease commencement date to complete the tenant installation works and to issue to the plaintiff a tax invoice for the works so completed, failing which the defendant would forfeit the entire of the fitting out allowance.*

3.19. *The lease commencement date was 1 December 2006.*

3.20. *The defendant issued the plaintiff with the tax invoice as provided for in clause 12 of Annexure "6.5" on or about 3 October 2008.*

3.21. *The defendant failed to complete the tenant installation works and to issue to the plaintiff a tax invoice for the works so completed within 90 days of the lease commencement date.*

3.22. *Accordingly the defendant forfeited the fitting out allowance as provided for in terms of clause 12 of Annexure "6.5".*

3.23. *Accordingly the plaintiff is not liable to the defendant for payment in respect of the fitting out allowance as claimed or for any other amount whatsoever."*

What does the SCA order mean?

[15] Precisely what is meant by the order is disputed. The Notice of Amendment proposed three amendments; ie, to paragraphs 3, 5 and 7. The amendment proposed to paragraph 7 was not objected to. Prima facie, one might think that the allusion to the 'second proposed amendment' refers to paragraph 5. If that were so, it must follow logically, that the whole of the proposed paragraph 5 is the subject matter of the SCA's referral.

[16] This interpretation is contested. The contention is advanced that significance should be attached to the preamble to the referral which says the appeal is limited 'to the following issues'. Support for this perspective, it is argued, derives from the formulation: 'Second proposed amendment *relating* to paragraph 5'. We were invited to read the petition presented to the SCA to aid comprehension of the order. The petition is divided up into sections with headings, 'The First proposed amendment' and the 'Second proposed amendment'. Significantly, the Notice of Amendment was not put before the SCA. Both amendments described in the petition relate to paragraph 5. The first proposed amendment is the new defence. The 'second proposed amendment' is the introduction of the words in paragraph 5, as underlined as innovations above, ie '... *and without limiting the generality thereof...*' in paragraph 5.2, and portion of the text incorporated by reference in paragraph 5.2.2 which regurgitates the defence pleaded in the initial plea.

[17] Therefore, the contention that the new defence is excluded from the purview of the appeal is correct. What was referred by the SCA is the question whether the effect of that text withdraws an admission that the only averment put in dispute in the initial plea was the failure to complete the installation and present an invoice timeously. That is the sole issue before this court and is now addressed.

Was there a withdrawal of an admission that the only issue in dispute was the defendant's failure to complete the installation and present an invoice timeously?

[18] The controversy relates to the insertion of the words; *"...without limiting the generality thereof..'* which did not appear in the initial plea. Whether or not this innovation resulted in the withdrawal of an admission was hotly debated. There is nothing in the judgment of Willis J to indicate he considered this specific controversy. Indeed, I incline to the view that the judgment addressed solely the effect of the introduction of the new defence. However, the Notice of Objection certainly raised this point in paragraph 2.1 [Record: p39]. Accordingly, the point is dealt with from scratch.

[19] As already established, Paragraph 3 of the counterclaim does no more than aver the terms of the lease. It does not allege any performance or breach.

The plaintiff's plea admitted para 3 unequivocally. Only in Paragraph 5 of the counterclaim is it pleaded that the defendant has performed in terms of the lease such that it would be entitled to payment of the sum mentioned in para 3.

[20] The first part of paragraph 5 avers plainly that whatever is averred in para 5 of the counterclaim is 'denied' and defendant 'is put to the proof thereof'. Those words admit of no mistake: the defendant is challenged to prove everything needed to establish entitlement. The second part of the paragraph uses, as its grammatical connector, the words '*in amplification of the aforegoing denial* ...' What work do these words perform? This is key to the paragraph's proper meaning.

[21] Two possible meanings are contended for. On the one hand, the plaintiff has put the defendant to the proof of everything, and in particular, the plaintiff will invoke the obligation (which indeed is provided in clause 12 of the lease) that the defendant had to complete the installation and present an invoice within 90 days of commencement date of the lease. (Commencement date was 1 December 2006; ie the 90 days expired on 28 February 2007) On the other hand, it is argued that it means that the defendant has not complied with the installation and presentation of an invoice within 90 days, but no other obligations resting on the defendant are in dispute.

[22] The plaintiff in its petition to the SCA alleged that the purpose of the proposed amendments were, first, to introduce the new defence and, secondly, to remove a misunderstanding, which came to light at a pre-trial conference, about the ambit of the plea in the initial paragraph 5. [Record: 47/10] The defendant denies any difference of opinion. [Record: 73/12] However, it seems plain that there is exactly such a difference of opinion.

[23] The approach to the interpretation of pleadings require, as in other interpretative exercises, a grasp of the context. That means reading the document as a whole and being alive to the purpose that the text is intended to serve. A pleading is not a mere recordal of a fact, it is a tool of litigation. Its function is to alert the adversary to the case it must meet. Words must be read for what they are and not be afforded any literary qualities. The critical phrase here is 'in *amplification of*' which follows a general denial.

[24] In my view, the possible meanings of the word 'amplification' do not include qualifying or diminishing the scope of an immediately preceding statement. The root of its meaning is to make louder, ie to emphasise or draw especial attention to a facet. In the Oxford Shorter Dictionary, 3rd Ed.(1978), Vol I, p 63 the word is described as indicating, enlargement, augmentation, extension of meaning, and additions. In Afrikaans, the operative words might be "uitbrei" or "versterk" among other examples.

[25] In argument, it was contended that the familiar phrase in lawyers jargon, 'put to the proof,' is usually used to mean that the pleader either (1) does not know if compliance with particular duties has occurred, or (2) will not admit it, and challenges the other side to show that there was indeed compliance and, furthermore, (3) signals to the adversary that no case in rebuttal will be put up. In my view, this is the usual usage. In the context of the text of paragraph 5 of the initial plea, that phrase is used in addressing the sweeping averments in the counterclaim that all obligations and pre-conditions have been complied with. The pleader however, then goes further, to specify the one obligation of the defendant about which the plaintiff can or will make a positive averment of non-compliance and will put up a rebuttal; ie the obligations about the installation and timeous invoicing.

[26] In Resisto Dairy v Auto Protection Insurance Co 1963 (1) SA 645 (AD) at 644 G – H Hoexter JA remarked:

> "In our law the fulfilment of a true suspensive condition must be pleaded and proved by the person who is relying on the contract, but the breach of a term in the contract must be pleaded and proved by the person who relies on such a breach as a ground for repudiating liability under the contract."

[27] In my view, paragraph 5 of the plea reflects that distinction. Thus, it is incorrect to read this text as putting in dispute a single issue; everything was in dispute, including the several obligations and preconditions alluded to in omnibus fashion in the counterclaim.

[28] To the extent that it might be thought to contain an ambiguity, which, in my view, there is not, a formal complaint that the text was vague and embarrassing was the appropriate riposte.

[29] In the result, no admission of the myriad of obligations and preconditions in respect of which the defendant bore an onus, was made in the initial plea.

[30] The text of the proposed amendment is: *"In amplification of the aforesaid denial, and without limiting the generality thereof, the plaintiff.."* and the innovation is the underlined words. The explanation tendered by the plaintiff is that it learnt at the pre-trial conference that the defendant had read the plea differently to its intention and so these words were introduced to remove doubt. In my view, there ought not to have been doubt to begin with and these words result in nothing more than a reaffirmation of what was already stated. Upon the construction I have placed upon the text of the initial paragraph 5 of the plea there was no withdrawal of an admission. It follows that if the court a quo did decide that there was a withdrawal of an admission in this regard, it erred. If the court a quo did not decide the matter, it is decided now.

[31] Para 5.2.1 of the proposed amendment is surplusage, as the substance has already been stated elsewhere in the particulars of claim, and is moreover, irrelevant to the counter claim *per se*.

THE OUTCOME

[32] The upshot of these considerations is that the proposed amendment effected by the introduction of the phrase 'without limiting the generality thereof' in the preamble to paragraph 5.2 of the Notice of Amendment does not purport to withdraw any admissions, despite a slight change of phraseology, nor does the text introduced by paragraph 5.2.2 by way of incorporation by reference to paragraphs 3.2 -3.3 and 3.17 – 3.23 purport to withdraw any admissions.

[33] The appellant has been successful in this appeal. In the application for an amendment, the respondent was substantially successful in that the amendment to introduce a new defence was refused. The appellant was partially successful in the petition. The costs of the application a quo were made costs in this appeal by order of the SCA. However, the debate before us in the appeal traversed both the excluded issue and the referred issue, and heads of argument were prepared to deal with both issues. The parties' fortunes have oscillated throughout this saga. In my view the costs order should reflect that. It is appropriate that the costs of the appeal be costs in the cause in the trial, which costs include the costs of the application a quo.

THE ORDER

[34] The appeal is upheld.

[35] The amendments in Paragraph 5.1, 5.2 (the preamble) and 5.2.1 and 5.2.2 are allowed, including the paragraphs incorporated by reference to paragraph 3, subject to the excision of paragraphs 3.4 – 3.16.

[36] The costs of this appeal, including the costs of the application a quo, shall be costs in the cause in the trial.

SUTHERLAND J

I agree

OPPERMAN AJ

I agree.

MBONGWE AJ

Hearing: 17 September 2014
Judgment Delivered: 30 September 2014

For the appellant:
Adv H Van Eeden SC, with him, Adv M G Rebello.
Instructed by Fullard Mayer Morrison Inc.

For the Respondent:
Adv D C Fisher SC.
Instructed by Smit Sewgoolam Inc.