IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 3071/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

5 MARCH 2019 **RT SUTHERLAND**

In the matter between

MAKE COMMODITIES (PTY) LTD **APPLICANT/ PLAINTIFF**

and

AFRISAM (SOUTH AFRICA) (PTY) LTD **RESPONDENT/ DEFENDANT**

Judgment in the Interlocutory Application:
Objection to a Notice of Amendment by the Plaintiff

Sutherland J:

[1] The Plaintiff instituted an action against the defendant for payment of money relying on an alleged breach of a contract between the parties. To this the defendant flied a plea, and subsequently a replication was filed.

[2] Thereafter, the plaintiff gave notice of an intention to amend its particulars of claim. The defendant objects on several grounds. Whether or not these grounds are good is the issue in this application.

[3] The contemplated amendments were prolix, but the substance of the amendments less radical than is apparent at first glance. Largely, the thrust of the amendments is to refine certain aspects and to add an alternative basis for the claim. Regrettably the preparation of the notice of amendment lacked care. The plaintiff concedes that several corrections to address either typographical, or similar errors and misdescription of paragraphs to which allusions were made require correction. Indeed, in "draft" amendment pages, given to the defendant, an effort to do repairs to this class of error had occurred. These errors *per se* warrant no further attention in this judgment. Mr Campbell, acknowledging the need for repair has tendered to present a sanitised version of the amendments to take care of them. In addition to meeting the specific errors identified in the notice of objection, further concessions were made as to complementary alterations to produce the required degree of clarity.

[4] For sake of clarity and good order this class of changes comprises:

4.1 Notice, paragraph 3: relating to date 28 August 2018.

4.2 Notice, paragraph 9: relating to the phrase "under the" and "but for".

4.3 Notice paragraph 10: relating to wrong numbering of paragraphs 27, 28, and 29 instead of paragraphs 12, 13 and 14.

4.4 Notice paragraph 11: relating to a wrong date 27 instead of 7 December 2017.

4.5 Declaration paragraph 12: the term "Agreement/offer" is replaced by "contract".

4.6 The reference to an annexure SP 2 which is attached to the present initial plea is substituted with a reference to an annexed document so as to maintain good order in the expectation of consequential adjustments to the plea itself.

4.7 An orderly numbering of annexures must be substituted for the confusing numbering in the notice of intention to amend.

4.8 Lastly, it is proposed that the Declaration, paragraph 3, be amended by the addition of this sentence:

"This is a modification of the contract and where terms of the Agreement/offer are inconsistent with the terms of this contract, the terms of the Agreement/offer prevail."

(This proposal gives rise to a discreet objection concerning excipibility, addressed hereafter and is subject to fate of that objection).

[5] A further complaint raised in the heads but not persisted with in argument, alludes to a reference to a "vendor application form" which is neither described as oral or written and if written is improperly not attached. This complaint is misconceived. The description makes plain it written, and to belabour the point that a form is written would be superfluous. Moreover, the non-attachment is not a violation of rule 18(6) as the document is not in the class of document that must be attached.

[6] Further complaints address contradictions or anomalies between the amended particulars and the averments in the replication to the plea. Such a complaint cannot arise. The particulars in an amended form will self-evident provoke the risk, in this case the certainty, that within the meaning of rule 28(8) there shall have to be "consequential adjustments" to the plea and in turn, to the replication. The complaint is invalid.

[7] A complaint is made in the defendant's heads of argument about the change of a descriptor; ie, "contract" to "agreement/offer" as contemplated in paragraph 3 and 4 of the notice of intention to amend - paragraph 3 (original particulars) and a new paragraph 3J. This document is to be identified as POC 6 in the draft amended pages. The document POC6 is headed "offer to supply...." and was signed by the plaintiff to indicate it was bound by its terms, but not signed by the defendant. A reading of the document POC 6 evidences that it contemplates a written contract to be concluded on the terms as set out therein. To call it an "offer" is consistent with its title and to describe it as an agreement is to acknowledge its alleged effect, if only potential. In my view, the description does not result in any uncertainty (a related controversy about the effect of this averment in paragraph 3 on the excipiability of the case advanced, presented thus, is addressed hereafter).

[8] There is a complaint about prejudice owing to belatedness, ie the pleadings had advanced to close, and further, the sought - after amendments were only proposed after certain further particulars had been sought and answered. The complaint is without

merit. A party may amend at any time and the fact that some strategic advantage is gained by sight of the other side's documents or case is irrelevant: it is an occupational hazard of litigation.

[9] What remains for consideration is the exception point. The thrust of the defendant's case is that the parties initially bound themselves to the terms of a written contract. This contract is styled "General Conditions of Purchase ..." It is a standard form contract of the defendant. The document in its standard form does not call for the parties to sign it; it is incorporated by reference in another document evidencing an agreement. The plaintiff wants to plead that by its step of binding itself to a another standard form document of the defendant, described by the plaintiff as the "agreement/offer", POC 6, and which is itself styled an "offer", a 'modification' of the contractual obligations was brought about.

[10] The defendant relying on clause 31.1 of the General Conditions argues that the effect of the clause is to prevent any modification occurring. *Ergo*, to aver a modification is to render the cause of action excipiable. The Text reads thus:

> *"31.1 No modification / variation or waiver of any provision of the Contract, or consent to any departure therefrom, shall in any way be of any force or effect unless confirmed in writing by the Company and then such modification, variation, waiver and consent shall be effective only in the specific instance and for the purpose and to the extent for which it is made or given.*
>
> *31.2 The waiver (whether expressed or implied) by any party to the contract of any breach of the terms or conditions of the Contract by any other party shall not prejudice any remedy of the waiving party in respect of any continuing or other breach of the terms and conditions of the Contract.*

31.3 No favour, delay, relaxation or indulgence on the part of any party to the Contract in exercising any power or right conferred on such party in terms of the Contract shall operate as a waiver of such power or right nor shall any single or partial exercise of any such power or right preclude any other or further exercise thereof or the exercise of any other power or right under the Contract.

31.4 The expiry or termination of the Contract shall not prejudice the rights of any party in respect of any antecedent breach or non-performance by any other party of any of the terms and conditions of the Contract."

[11] There is also another clause, 2.1, which bears on the same theme:

"2.1 No amplification, variation or substitution or any purported amplification, variation or substitution of these Conditions shall be of any force or effect unless specifically agreed to in writing by the Company."

[12] The counter contention is that both clauses contemplate that a modification can occur; hence if it is permissible, the plaintiff may properly plead a modification took place. The absence of a signature on the "agreement/offer" is said to be of no significance to the pleading *per se*, but is, rather, merely an aspect of evidence relevant to establishing consensus.

[13] This contention, it seems to me, leaves out of account the balance of clause 2; it provides further:

"2.2 Unless the contrary is recorded in writing and signed by an authorised representative of the Company and the Seller shall be governed by these terms which shall override any terms and conditions purported to be imposed by the Seller.

2.3 If any condition stipulated herein is invalid and unenforceable, or becomes such, such invalid provision shall be severable from the remainder of this Contract which shall nevertheless be valid and binding. The Parties hereto shall be obliged to replace the invalid provision with an alternative provision having similar economic consequences, provided that such replacement does not lead to a material alteration of the Contract.

2.4 If any provision in the definition is a substantive provision conferring rights or opposing obligations on any Party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were substantive provision of this Contract."

(Emphasis supplied)

[14] In my view, the effect of these provisions is to plainly set up a non-variation regime subject to strict conditions. One such condition is the unequivocal consent of the defendant by its signature. It must follow that to aver a modification of the general conditions without averring a signature is to set up an excipiable case. Accordingly, that averment and any other averments which are dependent upon it ought not to be allowed.

[15] In the result, although the "corrected aspects" of the amendments could be, in principle, allowed, the effect of disallowing the crucial aspect of the scheme of amendments, ie an alternative *causa*, the neatest and most useful way to address the issue is to disallow the notice of amendments altogether and leave it open to the plaintiff, if so advised, to present a fresh notice that escapes excipiability.

[16] As the notice of amendment was fated to provoke controversy and has had to be substantially corrected, and in part abandoned, it is just that the plaintiff bear the costs of opposition, albeit that some of the objections have failed. A call to award attorney and client costs is not justified despite the intemperate tone of the exchanges between the attorneys and the irritation inspired by the errors in the notice.

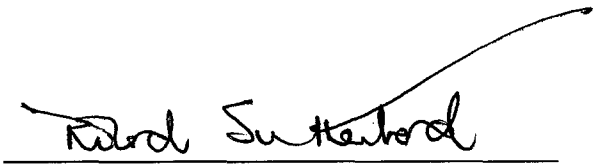
[17] In the future, the parties are not to launch any interlocutory applications without a directive from either Judge Mahalelo or from me. An email articulating a complaint may be sent to both judges and only if a pragmatic solution to whatever aggrieves a party or cannot be resolved, except by a formal application, will such proceedings be allowed.

[18] **The Order**

(1) The notice of amendment, in its entirety, is disallowed.

(2) The plaintiff is granted leave to file a further notice of amendment, if so advised, within 10 days of the date of this judgment.

(3) The plaintiff shall bear the costs.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of hearing: 1 March 2019
Date of judgment: 5 March 2019

For the Applicant/Plaintiff: Adv JWG Campbell SC
Instructed by Mbana Attorneys

For the Respondent/defendant: Adv IL Postumus
Instructed by Barnard Inc Attorneys