REPUBLIC OF SOUTH AFRICA

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

Case No.2017/39176

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED. No

R S Shepstone
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R. SHEPSTONE **13 June 2023**

In the matter between:

THOMPSON KUSELA CC T/A

THOMPSON SECURITY GROUP **APPLICANT/DEFENDANT**

and

DEWALD BUYS T/A MASIMA BLOCK WATCH **RESPONDENT/PLAINTIFF**

JUDGMENT

Introduction

"It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings."[i]

[1]. Applications to remove admissions made in pleadings are often hotly contested. This is such a case.

Background

[2]. The defendant launched an application in terms of Rule 28(4) of the Rules of Court for leave to amend its plea in accordance with the notice of intention to amend dated 8 January 2021. The plaintiff objected to the defendant's proposed amendment. The plaintiff contends that the proposed amendment seeks to withdraw an admission made in the plea, without the defendant giving a full and proper explanation of its reasons for doing so, to enable the court to determine whether or not the withdrawal of the admission is *bona fide*.

[3]. The plaintiff asserts that it is not withdrawing an admission.

[4]. In this judgment I will use the language of the pleadings i.e. it was a sale of contracts, and contracts were received by the defendant. I do not pass comment on the correctness of the language used by the parties.

The pleadings

[5]. The plaintiff in his particulars of claim relies on a written agreement concluded between the parties in October 2015, for the sale of all security contracts held by the plaintiff to the defendant. The plaintiff alleges that it was a term of the agreement that the defendant would make payment to him of the amount of R 40372.67 per month for as long as the "abovementioned contracts" run. A cursory perusal of annexure "A" to the particulars, which is the written agreement relied on by the plaintiff, shows that no security contracts are listed therein and therefore no security contracts are identified in the document which underpins the plaintiff's cause of action.

[6]. In paragraph 5 of the particulars of claim, the plaintiff alleges that the contracts referred to in paragraph 4.1 are the contracts and client (*sic*) as contained in annexure "B" to the particulars of claim, from which contracts and clients the defendant has been deriving financial benefit.

The admission

[7]. The plaintiff, in paragraph 5 of the Particulars of Claim, pleads the following: -

> "*The contracts referred to in paragraph 4.1 are the contracts and client as contained in annexure B hereto, which contracts and clients the defendant has been deriving financial benefit.*"

[8]. In response, the defendant pleaded as follows: -

> "6.1 *The content of this paragraph is denied.*

6.2 *Without derogating from the aforesaid denial, the defendant pleads that it did not receive all of the contracts as stated in annexure B from the plaintiff and could consequently not derive financial benefit from all such contracts.*"

[9]. The plaintiff submitted that the defendant by implication admitted in its plea that it 'received' some of the contracts listed in annexure B, and derived a financial benefit from the contracts it did receive, having on its own version not received all the contracts.

[10]. In its application for leave to amend the defendant seeks an amendment deleting the entire content of paragraph 6.2 of its plea. The defendant is thus, according to the submissions of the plaintiff, seeking to withdraw an admission.

The law

[11]. The consequences of a formal admission are twofold. First, it obviates the need for proof of the admitted fact. Second, it prohibits parties from disproving such fact. This prohibition is enforced to such an extent that a court will resolve an issue based on an admitted fact, even in instances where it is aware that the admission is not accurate.[ii]

[12]. This, however, does not imply that a party who has made an inaccurate or mistaken admission is left without recourse. Such a party may deliver a notice of its intention to withdrawal the admission.

[13]. If the admission was made in the pleadings, an application for an amendment of the pleadings would be necessary. In suitable circumstances, this can be granted, even post-judgment.

[14]. An amendment is typically granted if there is a reasonable justification for the original admission and the subsequent request for its removal, and if the removal will not result in an incurable prejudice to the opposing party, provided that an appropriate order as to costs can rectify it.

[15]. In ***Botha v. van Niekerk***[iii], the court held that an admission is an unequivocal agreement by one party with a statement of fact made by another party.

Leave to amend

[16]. The defendant in argument asserted that the plea caused confusion and in order to mitigate that confusion it decided to amend its plea to delete paragraph 6.2 thereof.

[17]. I agree that paragraph 6.2 of the plea creates confusion.

[18]. In my view, the pleader cannot unequivocally allege that it received no contracts and then in the same breath attempt to clarify that denial by stating that it did receive some of the contracts. The defendant's plea is therefore ambiguous and unclear.

[19]. The plaintiff asserted that if one considers the pleadings before and after the intended amendment it becomes evident that by implication the defendant received some of the contracts and derived a financial benefit from the

contracts it did receive. This, the plaintiff asserted, is the admission made in the plea.

[20]. There is no agreement pleaded in paragraph 6.2 of the plea, however, which can constitute an admission of a fact. One can only infer from paragraph 6.2 that some of the contracts were received by the defendant. These contracts are not identified and thus there is no basis upon which the plaintiff can allege that the defendant has admitted that particular contracts were identified as being part of the agreement.

[21]. Section 15 of the Civil Proceedings Evidence Act 25 of 1965 provides that the consequences of a formal admission are that it becomes unnecessary to prove the admitted fact.

[22]. This begs the question: What would the consequence of the purported admission be in this matter? That it is unnecessary for the plaintiff to prove that the defendant received certain of the contracts? The uncertainty still exists – which of the contracts did the defendant receive?

[23]. The purported admission does thus not alleviate the burden on the plaintiff to prove which of the agreements were received by the defendant.

[24]. This is why the law requires the admission to be an unequivocal agreement by one party with a statement of fact made by another party.

[25]. The problem faced by the plaintiff is that the particular contracts which it alleges has been admitted by the defendant as received cannot be identified.

[26]. I thus agree with the defendant that paragraph 6.2 of the plea does not contain an unequivocal admission of fact.

[27]. One would have thought that my conclusion that paragraph 6.2 does not contain an unequivocal admission of fact would be the last word on the matter, but it is not.

Further particulars

[28]. On 28 October 2020 the plaintiff requested further particulars for purposes of trial from the defendant. I must emphasise that the request for further particulars was brought prior to the service of defendant's notice of intention to amend its plea on the plaintiff.

[29]. Paragraph 7 of the request for further particulars reads as follows.: -

> " *7. In paragraph 6.2 it is alleged that the defendant did not receive all of the contracts and clients as stated in annexure B from the plaintiff and could consequently not derive financial benefit from all such contracts.*
>
> *8. The defendant is requested to state exactly:*
>
> *8.1 Which contracts it did not take over in relation to those indicated in annexure "B" from inception of the agreement and why?*

8.2 Which contracts it did take over in relations to annexure "B" from inception of the agreement?

8.3 Which contracts it did take over in relations to annexure "B" from which were terminated subsequent to the takeover?

8.4 For what period were those contracts taken over prior to termination?

8.5 Which contracts taken over by the defendant in relation to annexure "B: are still in place?

8.6 What financial benefit, in rand value, the defendant received;

8.6.1 From the contracts that were terminated.

8.6.2 From the contracts which still remain in place?"

[30]. The defendant responded to the plaintiff's request on 1 February 2021. I emphasise that this response was given after the defendant had delivered an application for leave to amend its plea.

[31]. The defendant, in response to paragraph 8.1 of the plaintiff's request for further particulars, stated that paragraph 6.2 of its plea is subject to an application for leave to amend that paragraph and that the response is therefore not an elaboration or clarification of the averments made in paragraph 6.2 of its plea in any way. It then responds that it concluded contracts with the following clients (which it lists in the response), which

contracts commenced and were terminated on the dates as stipulated. The list of clients is alarmingly similar to the schedule of contract attached to the particulars of claim as “B”.

[32]. Rule 21(3) provides that a request for further particulars for trial and the reply thereto shall, save where a party is litigating in person, be signed by both an advocate (or an attorney who has the right of appearance in the High Court) and an attorney. Further particulars are thus by definition pleadings. The request for further particulars and the reply therefore amplify the plaintiff's particulars of claim and the defendant's plea and should be read in conjunction with the particulars of claim and plea. Accordingly, if there was any ambiguity in paragraph 6.2 of the plea then such ambiguity has in my view being removed by the request for further particulars and the response thereto.

[33]. In the premises I cannot fathom on what basis the defendant sought to continue with its application for leave to amend and on what basis the plaintiff objected and opposed the amendment of the plea on the grounds it did.

[34]. The only reasonable explanation is that the parties’ legal representatives failed to appreciate that the further particulars were pleadings which amplified and clarified the particulars of claim and the plea.

History of litigation

[35]. The litigation between the parties in this matter has a long and drawn-out history.

[36]. The plaintiff sued out summons in the above honourable court in October 2017. There appear to have be various amendments to both the particulars and the plea, but this is extremely difficult to ascertain as the CaseLines bundle does not include a “Pre-amendment Pleadings” section. One then has to trawl through the notices section to find any relevant notices, however, not all the notices have been included in that section. In addition, the documents in the “Notices” section have not been uploaded in chronological order having the effect of wasting valuable time in attempting to locate the relevant documents.

[37]. The defendant's first notice of intention to amend is dated 26 November 2020. The plaintiff objected to the intended amendment by the defendant in a notice dated 2 December 2020. This is, however, not the notice of intention to amend pursuant to which this application was brought. The defendant issued a second notice of its intention to amend its plea purportedly on 8 January 2021. I am not sure why a second notice of intention to amend was delivered.

[38]. I furthermore cannot ascertain the date of the second notice as it is not filed under the notices section on CaseLines, and the second page of the notice indicating the date is not attached to the application for leave to amend.

[39]. I asked Mr. Nel why the defendant persisted with its application for leave to amend as it appeared to me to be unnecessary as the further particulars had crystallised the issues. Mr. Nel replied that it was the prerogative of the litigants to decide what course to take in the litigation.

[40]. I agree that within the framework of an adversarial legal system, the contesting parties bear the responsibility (or duty) for steering the trajectory of litigation. This includes the determination of which interlocutory applications to bring, setting the tempo of the litigation and, apart from judicial case management, the conduct of the litigation as a whole. The parties conduct the litigation within the bounds of the Rules of Court, practice directives and ethical norms. This encompasses the presentation of their case in court, inclusive of evidence and argument. In an adversarial system, such as in South Africa, the court assumes a passive role, only adjudicating on issues or queries presented by the litigating parties. This stands in contrast to an inquisitorial system, wherein the court assumes a more proactive role in the orchestration of the litigation, as well as in the collection and evaluation of evidence.

[41]. A court may, however, provide commentary on the conduct of litigation by the parties in the award of an adverse costs order. This may include depriving undeserving legal representative of their fees, or by making no order as to costs.

[42]. The consequence of unnecessary litigation is that scarce judicial resources are being wasted.

[43]. In this matter the defendant persisted with an unnecessary application for leave to amend and the plaintiff opposed the application. If the purpose of the application for leave to amend was, as Mr. Nel put it, to mitigate the confusion contained in paragraph 6.2 of the plea, then this confusion in my view was not

only mitigated by the defendant's response to the further particulars, but completely removed.

[44]. On the other hand, the plaintiff's insistence that paragraph 6.2 of the plea constituted an admission of fact is also misplaced. The particulars provided by the parties after the application for leave to amend was brought, clearly identifies which contracts were ceded by the plaintiff to the defendant, which of those contracts were executed by the defendant pursuant to the cession and the period in which the contracts were executed and for which the defendant derived a financial benefit.

Conclusion

[45]. Notwithstanding the above, I have to rule on the application.

[46]. The application has become moot and will have no practical result.

[47]. The plea in its present from is more consistent with the pleadings as a whole, and here I include the further particulars. The granting of the amendment would render the plea vague and embarrassing prompting further amendments, to the prejudice of the plaintiff.

[48]. I accordingly dismiss the application for leave to amend.

[49]. I find that it was unnecessary for the plaintiff to object to the amendment and to oppose the application.

[50]. In my view, the application has had the practical effect of wasting scarce judicial resources and has increased the cost of litigation for both parties. I hence exercise my discretion relating to the costs of this application by not awarding the successful party its costs.

Order

In the consequences, I make the following order:

1. The application for leave to amend is dismissed.

2. There is no order as to costs.

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[i] Civil Proceedings Evidence Act 25 of 1965, section 15.

[ii] *Law of South Africa* (LAWSA), Evidence (volume 18 – third edition) paragraph 158.

[iii] 1947 (1) SA 699 (T) at 702-703.

R S Shepstone

R. SHEPSTONE
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 05 June 2023
Judgment: 13 June 2023

Appearances

For Applicant: Adv Sias B. Nel
Instructed by: Wynand du Plessis Attorneys

For Respondent: AJ Cronje
Instructed by: Otto Krause Attorneys