IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

2016.10.10
DATE

SIGNATURE

CASE NUMBER: 72512/13 and 72513/13

DATE: 10 October 2016

NAMPAK PRODUCTS t/a NAMPAK LIQUID PURCHASING — Plaintiff

REGISTRATION NR. 1963/00454/06

V

DAIRYBELLE (PTY) LTD — Defendant

Reasons for JUDGMENT

MABUSE J:

[1] This matter came before Court on 22 August 2016 in which the following order was granted by this Court:

"Leave is hereby granted with costs, to the defendant in both the case numbers 72512/13 and 72513/13 to amend both its plea and counterclaim as set out in its notice of intention to amend dated 3 December 2015."

Although I made an order in this application, I did not give reasons there and then. These are therefore the reasons for the order that I made on 22 August 2016. The defendant seeks leave of this Court to amend its plea to the plaintiff's claim against it and its counter claim against the plaintiff. The plaintiff has raised certain objections against the defendant's application for leave to amend and on such bases opposes the application.

[2] There are two matters involved in this application and these are case number 72512/2013 and 72513/2013. Because of the identical similarities in the issues raised in not only the issues in the main action but also in the defendant's application for leave to amend and the plaintiff's grounds of objection the two matters were consolidated and the applications in respect of the two matters were heard as one.

[3] The plaintiff has taken a point that in seeking leave to amend its plea and counterclaim, the defendant did not follow the form of a notice supported by a founding affidavit, but instead simply launched its application on a notice without the affidavit. This approach has somewhat unsettled the plaintiff who raised this technical point in their heads of argument. I will in due course come back to this issue.

[4] The plaintiff has issued summons against the defendant in which it has claimed payment of money and certain ancillary relief. In its amended particulars of claim the plaintiff has pleaded as follows:

"3. During or about August 2012 and at Johannesburg, alternatively Pretoria, and further alternatively Bloemfontein and/or Cape Town, the Plaintiff duly represented by Anthony Santana alternatively a duly authorised representative or employee and the Defendant duly represented by Jacques Fourie alternatively a duly authorised representative or employee concluded a partly written and a partly oral agreement ("the agreement").

4. A copy of the partly written part of the agreement is annexed hereto, marked "POCA" being the plaintiff's Standard Terms and Conditions of Sale.

5. The material express alternatively tacit alternatively terms of the agreement were inter alia as follows:

5.1 The Plaintiff would supply the Defendant with and sell to the Defendant goods being inter alia bottles, caps and labels for fruit juices and drinking yoghurt for the Defendant's Cape Town and Bloemfontein dairies ("the goods").

5.2 The terms Plaintiff's Standard Terms and Conditions of Sale would be applicable, save for the terms of the agreement inconsistent therewith as referred to below.

5.3 The purchase price for the goods –

5.3.1 would be the agreed purchase price alternatively the plaintiff's usual purchase price further alternatively the fair and reasonable purchase price for the goods;

5.3.2 would be paid by the defendant to the plaintiff within 30 days from the date of delivery of the plaintiff's statement.

5.4 The Defendant would be granted 8% of total rebate."

[5] The defendant then pleaded as follows to paragraph 3 of the plaintiff's particulars of claim:

"AD PARAGRAPH 3

3.1 The defendant pleads that during August 2012 the plaintiff, represented by Anthony Santana and the defendant, represented by Jacques Fourie concluded an oral agreement

("the oral agreement"), the material express, and alternatively tacit, further alternatively implied terms of which were inter alia:

3.1.1 that the plaintiff undertook to supply the defendant with inter alia bottles, caps and labels for fruit juices and drinking yoghurt for the defendant's Cape Town and Bloemfontein Dairies;

3.1.2 that the purchase price for the items purchased from the plaintiff would be a price agreed to between the parties;

3.1.3 that the defendant would be afforded 60 days from the date of statement in respect of its purchase to pay the plaintiff;

3.1.4 that the defendant would be granted a rebate of 8% of the total sales;

3.1.5 that in the event that either party wished to cancel the agreement, they were required to give the other reasonable notice, which in the circumstances would be no less than 60 days' notice, during which period the parties would continue to honour the agreement by inter alia continuing to fulfil orders placed in terms and conditions set out above."

3.2 Save as ever said the defendant denies each and every allegation herein contained."

[6] It is as clear as crystal that with regard to this point there is a dispute between the parties about the character of the agreement that the parties concluded through their representatives. While on the one hand the plaintiff pleads that the agreement was partly oral and partly written, the defendant, on the other, pleads that such an agreement was oral.

[7] It is crucial, at this stage, to point out that the defendant's contention that the agreement was oral was also its evidence at the application or summary judgment. The same Jacques Fourie deposed to an affidavit opposing an application for summary judgment. In paragraph 7 of the said affidavit, he testified that:

"In and during August 2012, the plaintiff, represented by Antony Santana, and the defendant, represented by myself, concluded an oral agreement."

This affidavit resisting the application for summary judgment was commissioned on 7 March 2014 while the defendant's plea, which was filed simultaneously with the defendant's counter claim and to which I will shortly revert, was delivered on 9 July 2014.

[8] In paragraph 12 of its counterclaim against the plaintiff for the payment of a certain sum of money and certain ancillary relief, the plaintiff repeated verbatim the contents of its plea in respect of paragraph 3 of the plaintiff's particulars of claim. In paragraph 13 of its counterclaim, the defendant emphasized that the agreement of August 2012 was verbal.

[9] The plaintiff pleaded to the defendant's counterclaim in its plea dated 21 July 2014. In paragraph 2 thereof, which was a direct response to paragraphs 12 to 19, including all the subparagraphs of the counterclaim, the plaintiff pleaded that the plaintiff repeats the content of paragraphs 3 to 9 including subparagraphs of the plaintiff's particulars of claim.

[10] On 10 December 2015, the defendant served the plaintiff with a 15 page notice of intention to amend, the purpose of which was to amend, among others, paragraph 3 of its plea by deleting the original paragraphs and replacing it with a new one, and by deleting, among others, paragraph 12 of its counterclaim against the plaintiff and replacing it with a new one. During December 2015, the plaintiff delivered a notice of objection to the defendant's notice of intention to amend. In the said notice, the plaintiff raised four grounds, appropriately numbered, of objections. I will come back to these grounds later. Suffice to mention that at the hearing of this application, Mr. Hollander, counsel for the plaintiff, made it clear to the court that the plaintiff would not persist with the second and third grounds of objection. The focus would, as a result, be on the first and fourth grounds.

[11] I now turn to the defendant's impugned amendments and thereafter to the grounds of objections to such amendments. In doing so I will only confine this judgment to those amendments objected to in the plaintiff's first and fourth grounds of objection. In paragraph 3.1.1 of the amendment the Defendant referred to the conclusion of a written Equipment and Product Supply Agreement. Having done so, the defendant continued to state that:

"A copy of that agreement is annexed marked 'A'."

For the purposes of completeness I will quote the paragraphs whereever reference to a written agreement marked 'A' is made:

"3.1.1 On or about 15 October 2004 and at Industria or Bloemfontein Metalbox South Africa Ltd t/a Nampak Liquid Packaging ("Metalbox") and Tiger Foods Brands Limited t/a Dairybelle ("Tiger Foods") concluded a written equipment lease and product supply agreement. A copy of that agreement is annexed marked 'A' ("the first agreement").

3.1.6.2 The plaintiff let to the defendant the equipment and packaging described in Annexure 'A' to the first agreement;

3.1.8 The first agreement was not cancelled by either the plaintiff or the defendant and remained binding on those parties in August and September 2013 at the time of the events pleaded below."

A similar amendment is contained in paragraph 3.2.1 where this time, reference to a written agreement marked 'B' is made. It states as follows:

"3.2.1 On 25 May 2005 and at Johannesburg or Bloemfontein the plaintiff and Tiger Woods concluded a further written equipment lease agreement and product supply agreement. A copy of that agreement is annexed marked 'B' ("the second agreement").

3.2.5 All of the terms and conditions of the second agreement were fulfilled and the agreement remained of full force and effect in August and September 2013 at the time of the event pleaded below."

[12] It was argued by Mr. Hollander that it is quite clear that in its notice of intention to amend the defendant denies the oral agreement pleaded by the plaintiff and admitted by the defendant, and denies furthermore that the plaintiff sold and delivered goods to the defendant pursuant to the admitted oral agreement as admitted by the defendant. According to Mr. Hollander the defendant now pleads that the two written agreements, one marked Annexure 'A' and the other marked Annexure 'B' were concluded; that pursuant to the aforementioned annexures two written agreements and in direct contradiction to the admitted oral agreements which the defendant had previously pleaded, goods were sold and delivered by the plaintiff to the defendant; and that, as opposed to the defendant having pleaded in its original counterclaim, that the plaintiff repudiated the admitted oral agreement with an additional term that the plaintiff repudiated the written agreement. It was argued by Mr. Hollander that it is as clear a crystal from its notice of intention to amend that the defendant now seeks to adopt a significant change of its stance. He contended that the defendant seeks to withdraw the admission it has made in circumstances where the defendant has offered or tendered no explanation at all for the withdrawal of such admissions.

[13] It was further argued by Mr. Hollander that where a withdrawal of an admission was sought or where there was a significant change of stance such a withdrawal of an admission or a change of stands must be motivated in an affidavit.

[14] Mr. Hollander argued that as it appears from the defendant's original plea to the plaintiff's particulars of claim in case nr. 72512/2013, and the declaration in case nr. 72513/2013, and as appeared furthermore from the defendant's original counterclaim, the defendant has made the following admissions that:

14.1 the plaintiff and the defendant concluded an oral agreement during August 2012 during which the plaintiff was represented by one Mr. Antonie Santana and the defendant by Jacques Fourie;

14.2 in terms of the oral agreement, the plaintiff would supply the defendant with, *inter alia*, bottles, caps and labels for fruit juices and drinking yoghurt for the defendant's Cape Town and Bloemfontein Dairies;

14.3 the purchase price for the items purchased from the plaintiff would be a price agreed to between the parties;

14.4 the defendant would be afforded 60 days from the date of statement in respect of each its purchases to pay the plaintiff;

14.5 the defendant would be granted a rebate of 8% of total sales.

[15] The defendant denies that it has admitted the plaintiff's version of the agreement. This is clear from the following paragraph 6.1 of the defendant's plea in each of the matters:

"The defendant denies the agreement as pleaded by the plaintiff and accordingly denies the sale and delivery of goods pursuant to the agreement as pleaded by the plaintiff and the plaintiff is put to the proof thereof."

Accordingly it is clear from paragraph 3 of the original plea that the defendant relies on an oral agreement. The defendant concedes though that in the oral agreement it has pleaded some terms and conditions which are similar to the terms and conditions the plaintiff has pleaded. The defendant, however, denies pertinently that annexures "Poca" or "Poc1" forms part of either agreement or indeed that there were any written terms to the agreement. The only terms common to the plaintiff and the defendant on the pleadings, as they currently stand, are:

15.1 in the Bloemfontein matter, the fact that the defendant would be granted a rebate of 8% of the total sales;

15.2 in the Cape Town matter, that the payment terms were 60 days from date of the statement and that the 8% rebate would be granted on total sales.

On the basis of the aforegoing the Defendant denies that the proposed amendments seek to withdraw tacts which are congruent between the parties.

[16] The conclusions that the plaintiff seeks to draw in paragraph 8 of its objection, namely that the proposed amendment will effectively withdraw previously admitted facts is, in my view, incorrect and does not sustain the objection.

LATENESS OF A NOTICE OF INTENTION TO AMEND

[17] A further component of the first ground of objection by the plaintiff appears to be founded on the lateness of the notice of intention to amend. The plaintiff complains that the amendments were only sought to be introduced one day prior to the date on which the matter had been enrolled for trial. For that reason the plaintiff objects to the proposed amendments on the basis that firstly, they are *mala fide* and secondly, they are an attempt to delay the finalisation of the plaintiff's claim. This argument is seen in the light of the fact that the defendant sought to amend its pleas and counterclaims on 12 November 2015 or date prior to 13 November 2015, the date on which the matter was scheduled to be heard. In the light of the fact that parties had agreed to a postponement of the trial as the defendant had tendered wasted costs on an attorney and client scale this ground lacks merit. The plaintiff agreed to a postponement of the trial for the purpose of enabling the defendant to introduce its amendment, and accepted the defendant's tender of costs on attorney and client scale. It is therefore not open to the plaintiff to complain on the delay.

[18] The question as to whether the amendments are *mala fide* or *bona fide* depends entirely on whether or not they are pursued in good or bad faith. The fact that the defendant introduces such amendments should be seen as a genuine attempt to ventilate real issues between the parties. In my view, it is indicative of the good faith in which the defendant introduces such amendments. The written agreements which the defendant seeks to introduce in support of his counterclaims, at face value, constitute agreements between the plaintiff and the defendant relevant to the Bloemfontein and Cape Town Diaries all of which are extent. Both documents have been signed by the persons purportedly representing the plaintiff and the defendant. In the

light thereof it would appear that the description of the amendment the defendant intends introducing as being *mala fide* by the plaintiff is misplaced.

THE FOURTH AMENDMENT

[19] Clauses 8.2 and 8.2.2 of Annexure 'E' and Annexure 'D' respectively to the first and second agreements, Annexure 'A' and Annexure 'B' to the defendant's proposed amendment state as follows:

"8.2 The sellers shall not be liable –

...

8.2.2 to the buyer for any damage whatsoever and howsoever arising whether based on contractual obligations, implied warrantees or on Seller's negligence and whether direct or indirect, consequential or otherwise which the Buyer may suffer, save and except the exact liability of the Seller as stated in paragraph 8.3 below which is in substitution for and excludes all other liabilities of whatsoever nature and howsoever arising."

Clauses 8.2 and 8.2.2 of Annexure 'E' and Annexure 'D' respectively to the first and second agreements, Annexure 'A' and Annexure 'B' to the defendant's proposed amendment, exclude liability on the part of the plaintiff in respect of the defendant's alleged claim for damages arising from the plaintiff's alleged breach, as per the defendant's notice of intention to amend, of the first and the second agreements. It was argued by Mr. Hollander that in the circumstances the defendant's proposed amendment will render the defendant's plea and counterclaim excipiable on the basis that the defendant's plea and counterclaim lacked the averments necessary to sustain a defence or cause of action, alternatively, are vague and embarrassing. He submitted that in the premises the defendant should, by reason of the aforegoing, be precluded from amending its plea and counterclaim as per its notice of intention to amend.

[20] Mr. Hollander argued that the wording of clauses 8.2 and 8.2.2 is wide enough to exclude liability on the part of the plaintiff in respect of the defendant's alleged claim for damages arising from the plaintiff's alleged breach as per the defendant's notice to amend or the first and second agreements. According to him this is evident from the wording *"any damage whatsoever and howsoever arising"*, and *"or otherwise"*. In this respect the Court was referred to **Christie's Law of Contract Edition at page 196** and **Beinashowitz and Sons (Pty) Ltd vs Night Watch Patrol (Pty) Ltd 1958 (3) SA 61 W at 64 D-F** and **Government of RSA vs Fibres Peanuts and Weavers (Pty) Ltd 1978 (2) SA 794 (A).**

[21] The defendant, seeking to rely on clauses 11.1 and 15 of the two written agreements, contends that clause 15 trumps clauses 8.2 and 8.2.2 of Annexure 'E' and Annexure 'D' respectively to the two agreements. For record purposes clause 11.1 states:

"The lessee shall, from the Commencement Date and for the duration of this agreement but its entire requirements of the Goods required for use on the Equipment from the Lessor on the terms and conditions set out in this agreement and Standard Terms and Conditions attached as annexure 'E' ('D'). In the event of any conflict between the standard terms and conditions and this agreement, the provisions of this agreement shall prevail."

Clause 15 states as follows:

"The use of the Equipment will be under the Lessee's exclusive management and supervision. Accordingly the lessee will be responsible for ensuring the proper use, management and supervision of the Equipment, operating methods and for establishing all proper checks necessary for the Lessee's intended use of the Equipment. The Lessee agrees that the Lessor shall not be liable to the Lessee or any third party for any claim, loss or damage from whatsoever cause arising including negligence of the Lessor, its servants or agents consequent upon the supply of the Equipment to the Lessee in terms hereof."

[22] Mr. Hollander contended that clauses 8.2 and 8.2.2 of Annexure 'E' and Annexure 'D' respectively to the two agreements did not conflict with clause 15 of the two agreements. As far as he is concerned clauses 8.2 and 8.2.2 instead evidently expanded upon the limitation of the plaintiff's liability to the defendant. He submitted that a party may contract out liability for non-performance, intentional or unintentional, of such party's obligations in terms of the contract. In this regard he relied on the case of **Galloon vs Modern Burglar Alarms (Pty) Ltd 1973 (3) SA 647 (C)** where the Court had the following to say:

"If the other party sees fit to agree to it, the preferences may competently insert into a contract a claim which will protect him from liability even for his own wilful default;"

[23] According to Mundell quite clearly the fourth ground is based on the proposition that clauses 8.2 and 8.2.2 of Annexures 'E' and 'D' to the first and second agreements preclude the damages formulated in the proposed amendment and that they thereby render the plea and counterclaim excipiable. Clauses 11.1 of both Annexures 'A' and 'B' contain the following provisions:

"The Lessee shall, from the commencement date and for the duration of this agreement buy its entire requirements of the goods required for use on the Equipment from the Lessor on the terms and conditions set out in this agreement, and the Standard Terms and Conditions attached as Annexure 'D'. In the event of any conflict between the standard terms and conditions and this agreement, the provisions of this agreement shall prevail."

Annexures 'A' and 'B' each contain a paragraph 14 which has the same terms. Those paragraphs determine a limitation of the plaintiff's liability to the defendants for damages. The relevant portion of those clauses reads as follows:

"The Lessee agrees that the Lessor shall not be liable to the Lessee or any third party for any claim, loss or damage from whatsoever cause arising, its servants or agents consequent upon the supply of the Equipment to the Lessee in terms thereof."

Quite clearly the limitation of liabilities in intended to be restricted to the damages which arise from: *"... consequent upon the supply of Equipment to the lessee in terms hereof."*

[24] This limitation according to Mundell does not restrict the plaintiff's liability to the defendant in terms contended for by the plaintiff. Considering the express provisions of clause 11.1 there cannot, under the circumstances, be an argument that the limitations established by clauses 8.2 and 8.3 expand the limited scope of clause 14. It was submitted by Mr. Mundell that the latter trumps the former. It is clear that the reading of clauses 8.2 and 8.3 reveals that those provisions relate, in principle, to damages which would flow from the supply by the plaintiff to the defendant of products in terms of these two agreements. These two agreements, in my view, do not limit the liability of the plaintiff to the defendant for the former's repudiation of the two agreements followed by the latter cancellation thereof. He relied on this aspect on Christie and Bradfield where they state as follows in the Law of Contract in South Africa, Second Edition at page 195:

"Our law therefore appears to be that an exemption clause may validly exempt from liability for unintentional but not intentional disclosure."

[25] According to the proposed amendments, the defendant's claims for damages are based on intentional non-performance on the part of the plaintiff as a consequence of which those claims are not struck by the exemption clause sought to be relied upon. The defendant's current counterclaim for damages, as formulated in the proposed amendment, is not struck by the aforesaid clauses 14 and 8. I agree with Mr. Mundell that the proposed counterclaims cannot be attacked by way of an exception and furthermore that the plaintiff's objection to the contemplated amendments and lacks, in my view, merits and cannot be upheld.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	*Adv. L. Hollander*
Instructed by:	*Wertheim Becker Inc.*
	c/o Friedland Hart Solomon & Nicolson
Counsel for the respondent:	*Adv. A Mundell (SC)*
Instructed by:	*Kokkoris Attorneys*
	c/o Strijdom Attorneys
Date Heard:	*22 August 2016*
Date of Judgment:	*10 October 2016*