IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

29/3/2016

CASE NO: 6258/2015

DATE OF HEARING: DECEMBER 2015

Not reportable

Not of interest to other judges

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

....
DATE SIGNATURE

In the matter between:

SANOJ JEEWAN Applicant/Plaintiff

and

TRANSNET LTD First Respondent/First Defendant

ERNST & YOUNG Second Respondent/Second Defendant

J U D G M E N T

OLIVIER, AJ

[1] This is an application by the plaintiff in the main action for leave to amend his particulars of claim in terms of Rule 28 of the Uniform Rules of Court. The first defendant has no objection, but the second defendant raises six grounds of exception against the notice of amendment.

[2] The plaintiff is Sanoj (a k a Mark) Jeewan, an adult male person. The first defendant is Transnet Limited, a public company. The second defendant is Ernst & Young, a professional services firm that provides a range of services in different industries.

[3] The plaintiff appeared in person. The second defendant was represented by counsel. The first defendant did not participate in the proceedings, but the proceedings were observed by its counsel.

[4] The plaintiff is a former employee of the first defendant. He was found guilty of misconduct, resulting in his dismissal from the first defendant. The plaintiff then referred the matter to the Transnet Bargaining Council, but he was unsuccessful. The second defendant had been retained by first defendant to conduct a forensic investigation of the alleged misconduct of the plaintiff.

[5] The plaintiff subsequently instituted action against the defendants, claiming damages.

The legal principles relating to amendments and exceptions

[6] The general principles in respect of amendments are well established. Rule 28 of the Uniform Rules of Court allows amendments to be made. They can be made with the consent of the opposing parties. However, when an opposing party notes a proper objection, the party wanting to make the amendment must approach the court for leave to amend.

[7] It will suffice if the Plaintiff demonstrates that the proposed amendment is deserving of consideration and introduces a triable issue. In the words of Carvey J in ***Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D) at 641A***:

> Having already made his case in his pleadings, if he wishes to change or add to this he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue, he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on record an issue for which he has no supporting evidence where evidence is required or save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

[8] The court has a discretion to refuse or grant the amendment, which must be exercised judicially. Applications for amendments are generally granted, with the exception where the opposing party will be prejudiced or where the amendment is mala fides. A court must not adopt an over-technical approach.

Telemetric v Advertising Standards Authority South Africa 2006 (1) SA 461 (SCA):

> Exceptions should be dealt with sensibly. They provide a useful mechanism, to weed out cases without legal merit. An over-technical approach destroys their utility.

[9] If an amendment is excipiable, it will not be allowed unless exceptional circumstances exist. See ***Cross v Ferreira 1950 (3) SA 443 (C)***:

> [S]ave in exceptional cases where the balance of convenience or some such reason might render another course desirable, an amendment ought not to be allowed where its introduction into the pleading would render such pleading excepiable. Indeed these cases appear to me to constitute specific illustrations of the general rule that amendments which would prejudice the opposing party ought not to be allowed."

[10] Herbstein & Van Winsen in *Civil Practice of the High Court* 5th Edition at page 683 write as follows on the aspect of excipiability of the amendment:

> An amendment should be refused on the ground of excipiability only if it is clear that the amended pleading will (not may) be excipiable (see Krische v Road Accident Fund 2004 (4) SA 358 (W). If the excipiability of the pleading is merely arguable or can be cured by the furnishing of particulars then it is proper to grant the amendment where the other considerations are favourable. It will be left to the aggrieved party to file exception if he so wishes.

[11] Any party seeking an amendment must provide the court with a reasonable explanation for the proposed amendment. The party wanting to make the amendment bears an onus to show that the opposing party will not suffer prejudice as a result of the amendment. Prejudice would essentially result where the opposing party cannot be put in the same position he was in before the amendments were made. Sometimes prejudice can be cured by an appropriate cost order or a postponement.

[12] An exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. It is a general rule that an exception on the basis that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegation will not be expunged. The onus is on the excipient to the show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. There are two considerations: does the pleading lack sufficient particularity to the extent that it is vague; and does this vagueness cause embarrassment of such a nature as would cause prejudice to the excipient?

[13] The reason given by the plaintiff for the amendment is that his main pleadings were poorly drafted as he had no legal assistance. He made the amendments in order to comply with rule 18(4) by removing opinions and so on. The essence of his case is that there is sufficient information available to the second defendant to allow it to plead.

[14] The second defendant attacks the whole of the amendment, arguing that it is excipiable on six grounds. I will deal first with the two exceptions which raise issues of law – grounds 3 and 6.

Ground 3: The existence of a fiduciary duty

[15] The plaintiff claims the existence of a fiduciary relationship between himself and the second defendant. He argues that he was a stakeholder in the function performed by the second defendant and that he had placed trust and confidence in it, and that the second defendant had undertaken to uphold his confidence and trust. He refers to the Global Code of Conduct of the second defendant to support further his argument:

> EY is committed to doing its part in building a better world. Our global Code of Conduct and our values underpin this purpose. They represent our commitment to all our stakeholders that we understand the confidence that they place in us to deliver quality in everything we do.

He refers to other codes of conduct and ethics too, as well as the most recent King report on corporate governance (King III), which refers to an employee as a stakeholder. The plaintiff contends that this applied to him, especially during the conduct of the investigation.

[16] He argues that by extension the second defendant owed him a fiduciary duty. The internal auditing function of the first defendant had been outsourced to the second defendant. Had it remained 'in house' the first defendant would have owed the plaintiff a fiduciary duty or at least a duty of care during the forensic investigation. The transfer of this function did not erase this duty.

[17] The plaintiff argues that this is a matter to be decided at the trial but second defendant disagrees. The second defendant asserts that the plaintiff's claim is bad in law, alternatively vague as no material facts on which the plaintiff bases his contention that a fiduciary duty exists, have been pleaded.

[18] The second defendant argues that no relationship exists between the plaintiff and the second defendant which could give rise to a fiduciary duty. There exists no contractual relationship between the plaintiff and the second defendant. On the plaintiff's own version the second defendant is an independent third party. The second defendant was retained by the first defendant to conduct a forensic investigation of the alleged misconduct of the plaintiff. Under such circumstances, how could it be said to owe a fiduciary duty to the plaintiff? The existence of such a duty would mean that the second defendant is subordinate to the plaintiff. There is no identity of interest between the two parties. In fact the investigator's interest is possibly in conflict with that of the party being investigated.

[19] The nature of a fiduciary relationship was described as follows in the classic case of ***Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168*** (at 177-8):

> Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position.

From this the element of trust emerges as a primary consideration. There also needs to be a legal relationship present.

[20] There is no closed list of fiduciary relationships and the court needs to consider the circumstances of a particular case to determine whether a fiduciary relationship exists. See ***Volvo (Southern Africa) (Pty) Ltd v Yssel 2009 (6) SA 531 (SCA)*** at par 16.

[21] There are principles and guidelines to assist the court in making this determination – for example, although agency is not a necessary element of a fiduciary relationship, the fact that agency exists will almost always give an indication of such a relationship. See **Phillips v Fieldstone Africa (Pty) Ltd and Another 2004 (3) SA 465 (SCA) par 27**.

[22] However, there can be no single test. In ***Volvo*** par 17 the SCA quoted with approval from the Australian case of ***Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41 (HC of A) 69***:

> I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.

[23] In my view the essence of a fiduciary relationship lies in the element of trust and reliance of one party on the other in some or other way. One party puts the interests of the other party above his own whenever conflict or the possibility of conflict arose. See generally **Phillips paras 37-8.**

[24] The plaintiff and the second defendant were not in any relationship of confidence, or trust where it could be said that there was reliance of the one on the other. In fact there was no contract or legal relationship of any kind between the plaintiff and the second defendant. The only connection between the plaintiff and the second defendant was that the first defendant had contracted the second defendant to investigate the plaintiff's alleged misconduct.

[25] The second defendant's primary duty was to the first defendant in terms of its contract with the first defendant. The second defendant stood in no position of trust towards the plaintiff and was under no specific obligation to

act in the interests of the plaintiff. In fact, such a duty would be in conflict with the second defendant's contractual obligations towards the first defendant.

[26] The fact that the plaintiff cooperated with the investigation or presented him with his bank statements does not establish a fiduciary relationship between them. Therefore, in my view no fiduciary relationship existed between the plaintiff and the second defendant. The amendment is bad in law. The exception succeeds.

Ground 6: The existence of a legitimate expectation

[27] The plaintiff argues that he had a legitimate expectation that the second defendant would act lawfully, with professional integrity and objectively. He argues that the second defendant had a duty to conduct the investigation in accordance with all applicable laws, regulations and standards. According to the King III report, an interest or expectation of a stakeholder is considered to be legitimate if a reasonable and informed outsider would conclude it to be valid and justifiable on a legal, moral or ethical basis in the circumstances.

[28] The second defendant argues that the plaintiff's claim is bad in law because a legitimate expectation only relates to a hearing before an adverse decision is taken, as determined in ***Duncan v Minister of Environmental Affairs and Tourism and Another 2010 (6) SA 374 (SCA).*** In other words, there can only be a legitimate expectation of procedural fairness – not of a substantive right.

[29] It is correct that in performing its investigations the second defendant must act in accordance with its Global Code of Conduct. But whether this code creates a legitimate expectation founded in law is doubtful.

[30] However, I cannot say so with absolute certainty. I am of the view that this particular point needs to be argued at trial, where the judge would have the benefit of full argument.

Ground 1: invalid and unlawful appointment of chairperson

[31] The plaintiff contends that the appointment of the chairperson of the disciplinary proceedings against him was unlawful and invalid. He relies on the Transnet Disciplinary Code and Procedures, specifically clauses 4.2 and 5.1. The plaintiff contends that this point is at least arguable and should be left to the trial court to decide.

[32] The second defendant argues that the Code does not support the plaintiff's claim. There is an incompatibility between the amendment and the Code, as the Code does not disallow the appointment of an external chairperson. Therefore, there is no basis for the allegation.

[33] The plaintiff argues that this amendment relates solely to the first defendant, and that it is not central to his case. As a result, the second defendant is not required to plead thereto "with any degree of substance".

[34] The second defendant claims that it cannot plead. The amendment is vague as the second defendant has to speculate about the basis of para 3.8.2 and how it is supported by the Code. Pleading to it would cause embarrassment. Alternatively, it fails to disclose a cause of action.

[35] I do not consider this amendment to be vague. The second defendant is in a position to plead. The exception on this ground is dismissed.

Ground 2: exculpatory evidence withheld

[36] The plaintiff alleges that exculpatory evidence was withheld from him by the second defendant. The second defendant argues that the plaintiff has failed to disclose the material facts on which his claims and allegations are based. For example, what is the nature of the evidence; where does this evidence emanate from; who on behalf of the second defendant had withheld the evidence? It therefore objects on the basis that the amendment is vague and embarrassing.

[37] In his replying affidavit the plaintiff gave more detail on this. He says that this has removed the cause of the complaint. This, second defendant argues, constitutes a concession by the plaintiff that his amendment lacked particularity and that the objection raised by the second defendant was valid. This makes the objections common cause and should result in the refusal of the objection. However, the particularity was provided in a replying affidavit and not in the pleadings.

[38] Despite the greater particularity provided subsequently, the second respondent maintains that the amendment is vague.

[39] The argument above applies equally to the fifth ground on the quantum of damages, says the second defendant.

[40] Despite the clarification being given only in the replying affidavit, I consider the additional information to have removed any possible vagueness. As explained above, an over-technical approach should not be adopted. I do not think the second respondent will suffer any serious prejudice.

Ground 4: allegations against Du Toit

[41] Serious allegations of tampering with meeting transcripts, failure to give the plaintiff an opportunity to respond to the preliminary findings, and attempting to extort payment are made by the plaintiff. The second defendant questions how any actions of Du Toit are causally linked to the dismissal of the plaintiff, considering the allegations made against the first defendant. The second defendant argues that this amendment is excipiable on the basis that no cause of action is disclosed.

[42] The plaintiff argues that the allegations against Du Toit are statements of material fact with sufficient particulars to allow the second defendant to understand the case it has to meet, and to plead. He says that he has listed the different ways in which the fiduciary duty was breached by the second defendant, and has disclosed a cause of action.

[43] The plaintiff bases this amendment on his claim that the second defendant owed him a fiduciary duty. Based on my earlier finding on this point, the exception against this amendment succeeds.

Ground 5: the quantum of damages

[44] According to plaintiff, sufficient information was provided to allow the second defendant to plead. He based his quantum on his contract of employment. He has removed the cause of the complaint in a replying affidavit.

[45] The second defendant claims that insufficient information has been provided on how damages have been calculated to allow it to plead. It cannot reasonably assess the quantum. For example, how were the amounts claimed for loss of earnings, loss of future earning, loss of incentive bonuses, loss of pension benefits and so on calculated? The amendment is vague and the second defendant would be embarrassed if required to plead. It amounts to a proverbial "thumb suck".

[46] Again, despite the clarification being given only in the replying affidavit, I consider the additional information to have removed any possible vagueness. As explained above, an over-technical approach should not be adopted. I do not think the second respondent will suffer any serious prejudice by the amendment.

[47] As referred to earlier, only in exceptional circumstances will amendment be granted when it is excipiable. The court's discretion must be exercised judicially taking into consideration the circumstances of the case. I have exercised this discretion, taking into account various factors, including that the court must not adopt an over-technical approach to the matter.

COSTS

[48] Both parties are partially successful. In all the circumstances I regard an order that the costs be costs in the action to be the most just.

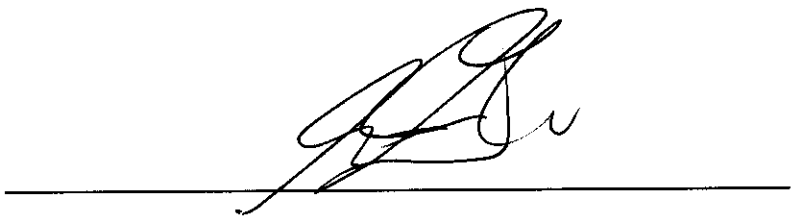
ORDER

[49] I therefore make the following order.

1. The second defendant's exception to the amendments under grounds 3 and 4 are upheld. The plaintiff's application for leave to amend its particulars of claim in respect of the amendments challenged on these grounds is refused and dismissed.

2. The second defendant's exception to the amendments under grounds 1, 2, 5 and 6 are dismissed. The plaintiff's application for leave to amend its particulars of claim in respect of the amendments challenged on these grounds is granted.

3. Costs are to be costs in the action.



OLIVIER AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Representation for the Plaintiff: In person

Representation for Second Defendant

Counsel Adv Govender

Instructed by: Norton Rose Fulbright South Africa