IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 39217/18
REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES / NO
REVISED
DATE: 1 June 2021

FIRST 3D (PTY) LTD Plaintiff/Applicant

V

CLEM COLEMAN First Defendant/Respondent

VISION SCREENER (PTY) LTD Second Defendant/Respondent

JUDGMENT

MABUSE J

[1] This is an interlocutory application by the Plaintiff to amend its particulars of claim ("POC"). This application follows upon an objection raised by the Defendants against such contemplated amendments. For ease of reference, I shall refer to the parties herein by the names they chose to call themselves in the main application.

[2] **THE PARTIES**

2.1 The Plaintiff, First 3D (Pty) Ltd, is a company with limited liability registered as such in accordance with the company statutes of this country, having its registered office at […], […], […], […], C[…], Gauteng.

2.2 The First Defendant, Clem Coleman ("Mr Coleman") is an adult businessman and the sole director of the Second Defendant, who resides at […], […], Extension […], C[…], Gauteng.

2.3 The Second Defendant, Vision Screener (Pty) Ltd ("Vision Screener"), is a company duly registered in terms of the provisions of the company laws of the Republic of South Africa, with its registered address located at […], […], Extension […], C[…], Gauteng.

[3] The Plaintiff has issued out summons against the Defendants in which it claims, among others, payment of a sum of R1,418,937.22. The Plaintiff's claim against the Defendants is based on an oral, alternatively tacit agreement with express terms, alternatively tacit, further alternatively with implied terms.

PARAGRAPH 4

[4] In its POC, the Plaintiff has, in paragraphs 4 and 11, which are the paragraphs it intends amending, pleaded its case as follows:

"4. On or about June 2012 and at or near JETPARK, Centurion, Gauteng Province, the Plaintiff, represented by its sole director, Nicky Smith, and the First Defendant, representing the Second Defendant, entered into an oral, alternatively tacit agreement, with the salient express, alternatively tacit, alternatively implied terms of which were, inter alia, as follows:

4.1 That the Plaintiff and the Second Defendant would procure the services of EFLEX Technologies (Pty) Ltd to develop and manufacture Vision Screeners;

4.2 That the First Defendant would attend to service all of the Vision Screeners sold (the aforementioned being the status quo which had developed prior to the pleaded agreement);

4.3 That, for every Vision Screener sold, after the deduction of the manufacturing cost owing to EFLEX, the Second Defendant would be entitled to 63% of the profit and the Plaintiff would receive 37% of the profit;

4.4 For all Vision Screeners sold, the purchaser would pay the full purchase price of the Vision Screeners to the Second Defendant and the Second Defendant would, in turn, transfer 37% of the profit directly to the Plaintiff;

4.5 That the Second Defendant has 30 days from the date of invoice to pay the amount as stipulated on said invoice to the Plaintiffs;

4.6 That any amount not paid by the Defendant shall bear interest up to the maximum permissible rate, from time to time; and

4.7 That should the Second Defendant be in default with payment of any amount due, the total amount due to the Plaintiff by the Second Defendant would become immediately due and payable."

PARAGRAPH 11

"11. <u>THE FIRST DEFENDANT'S LIABILITY JOINTLY AND SEVERALLY</u>

11.1 The First Defendant is the sole director of the Second Defendant;

11.2 The First Defendant, as the sole director of the Second Defendant, was knowingly a party to the conduct of the Second Defendant's business as pleaded above; and

*11.3 In the premise, First Defendant is personally liable to the Plaintiff in the amount of **R1,488,937.22 (ONE MILLION FOUR HUNDRED AND***

EIGHTY-EIGHT THOUSAND NINE HUNDRED AND THIRTY SEVEN RAND AND TWENTY TWO CENTS).*"*

[5] The purpose of the Plaintiff's contemplated amendment is to make the said paragraph of the POC to now read as follows:

PARAGRAPH 4

"4. During or about June 2012, and at or near Centurion, the Plaintiff duly represented by Nicky Smith and the Defendant duly represented by the First Defendant as its duly authorised representative entered into an oral agreement the relevant terms of which were:

4.1 That the Plaintiff and the Second Defendant would procure the services of EFLEX Technology (Pty) Ltd to develop and manufacture Vision Screeners;

4.2 That the Second Defendant would be utilised to sell the Vision Screeners so obtained;

4.3 That, for every vision screener sold, after the deduction of manufacturing costs owed to EFLEX, the Second Defendant would be entitled to 63% of the profits and the Plaintiff would receive 37% of the profits;

4.4 For all Visions Screeners sold, the purchaser would pay the full purchase price of the Vision Screeners to the Second Defendant, who would in turn transfer the 37% of the profits to the Plaintiff;

4.5 The Plaintiff would invoice the Second Defendant per vision screener sold;

4.6 The Second Defendant would pay the Plaintiff its 37% share of the profits within 30 (thirty) days from the date of invoice of the Plaintiff;

4.7 That should the Second Defendant fail to make payment to the Plaintiff of any amount due per invoice then all amounts owed to the Plaintiff would become immediately due and payable in full.

***2. BY THE DELETION OF PARAGRAPH 11 AND REPLACEMENT THEREOF WITH THE FOLLOWING**:*

11.

11.1 The First Defendant is the sole director of the Second Defendant;

11.2 The First Defendant, as the sole director of the Second Defendant, was knowingly a party to the contract in agreeing the Second Defendant would make payment to the Plaintiff and was complicit and a party to the conduct of the Second Defendant in breaching the agreement between the parties and the Second Defendant's refusal and/or failure to pay the Plaintiff;

11.3 Such conduct of the First Defendant constitutes a breach of his fiduciary duties as director in acting recklessly and/or negligently in conducting the business of the Second Defendant at the time when services and goods were rendered in terms of the agreement in paragraph 4 supra.

11.3 In the premises, the First Defendant is personally liable to the Plaintiff, jointly and severally, with the Second Defendant, in terms of s 218(2) of the Companies Act 71 of 2008, in the sum of R1,488, 937.22 (ONE MILLION FOUR HUNDRED AND EIGHTY-EIGHT THOUAND NINE HUNDRED AND THIRTY SEVENR AND AND TWENTY-TWO CENTS)."

[6] In one paragraph the Defendants have raised the following objection against the aforementioned contemplated amendments:

"1. The Plaintiff's intended amendments to the particulars of claim will, if amended, cause the particulars of claim to be vague and expiable (sic) (it should be excipiable) and we object to the amendment made specifically with reference to paragraph 11.3 as it introduces a new cause of action."

[7] The Defendants' opposing affidavit, deposed to by Attorney Armand de Kock ("Mr de Kock"), contains, as its ground of objection to the intended amendments, the said single paragraph.

[8] At close perusal of the objection shows that there are two grounds upon which the ground of objection is based:

8.1 the first ground, presumably raised against the whole intended amendment; and

8.2 the second ground, that the amendment introduces a new cause of action, is only against paragraph 11.3 of the contemplated amendment.

EXPANSION OF THE GROUNDS OF OBJECTION

[9] In their opposing affidavit, the Defendants state that the Plaintiff filed its first notice of intention to amend ("the first notice to amend") on or about March 2020. The Defendants raised an objection against that notice of intention to amend. Later during December 2020, the Plaintiff filed another notice of intention to amend ("the second notice of intention to amend"). The purpose of the Plaintiff's second notice to amend was an attempt to amend additional parts of the POC as compared to the first notice of intention to amend. Again the Defendants objected to the second notice to amend.

[10] It is the Defendants' case in the said opposing affidavit, that quite clearly from the launch of the action, the Plaintiff was uncertain of the facts of the said verbal agreement between the parties. According to the Defendants, that this is so, is manifested by the two notices to amend.

[11] Furthermore, it is argued on behalf of the Defendants, that the second notice to amend, was an attempt to amend paragraph 4.2 of the POC by now averring that according to the verbal agreement, the Second Defendant did in fact not "service all of the vision screeners sold" but rather the Second Defendant would be "utilised to sell the vision screeners so obtained". The Defendants' complaint is that this creates a confusion as to the role and responsibilities of the Second Defendant as a party to the alleged agreement and the nature of the agreement itself.

[12] Before Court Adv LK van der Merwe ("Mr van der Merwe"), for the Defendants, argued that when you compare the current paragraph 4 of the POC with the proposed amendment to paragraph 4, one immediately realises that the current paragraph 4 of the Plaintiff's POC dealt with "service" and that the proposed amendment to the POC deals with "sale". His further argument is that what the Plaintiff does by the amendment of paragraph 4 is to replace one agreement with another. The debt that is owed and arising from "services" is different from the debt that is owed and arising from "sales".

[13] Finally, it was argued on behalf of the Defendants that there exists a "bar" to the introduction of a new cause of action through paragraph 11.3 of the new amendment. In support of this argument, Mr van der Merwe referred the Court in his heads of argument to the unreported judgment of **Papesch v Spanholtz (19183/2007) [2017] ZAWCHC 121** in which the Court had the following to say:

"37. The suggestion by the Defendant that the claim in respect of the water is not a new cause of action as it does not raise a new cause of action, but "merely alleges further acts of negligence" upon which the Defendant intends to rely, is unconvincing. The alleged breach relied upon by the Defendant is clearly a separate breach, and a separate and new cause of action, with separate facts, and separate damages. Moreover, the existing claims for damages against the Plaintiff are all premised on a breach of warranty, whereas the current proposed claim is premised upon a negligent misrepresentation and accordingly a claim in delict and not upon a breach of contract. Furthermore, the suggestion by the Defendant that it relies on a further act of negligence by the Plaintiff for the proposed amendment is also unconvincing, as the Defendant in the existing claim in the reconvention does not rely upon any claim based upon an "act of negligence"."

[14] Adv van der Merwe argued furthermore that the allegation that there was a breach of fiduciary duty by the First Defendant does not in itself find application on any agreement upon which the Plaintiff relies but in fact represents an alleged judicial liability of the duty. According to his argument, the allegations to be dealt with to sustain a new cause of action represent, in fact, "a separate and new cause of action, with separate facts, and separate damages". He contends that in this regard s 77 of the Companies Act 71 of 2008 would apply to the First Defendant in his capacity as the director of the Second Defendant as follows:

"2. A director of a company may be held liable –

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in s 75, 76(2) or 76(3)(a) or (b); or

(b) in accordance with the principles of the common ***law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of*** *–*

(i) a duty contemplated in s 76(3)(c);

(ii) any provision of this act not otherwise mentioned in this section; or

(iii) any provision of the company's Memorandum of Incorporation."

[15] He then concluded by arguing that the aforegoing is sufficient proof that the allegation put forward in the amendment of paragraph 11.3 of the POC constitutes an entirely new cause of action that will need to be proven in a separate matter. Furthermore, so argued Mr van der Merwe, it also establishes a new claim for which the First Defendant would be liable as the "breach of fiduciary duty" will constitute a piercing of the corporate veil, which represents a totally separate cause of action with its separate requirements.

[16] Adv BD Stevens argument is that the proposed amendment to the POC would not be prejudicial to the Defendants and they will not be vague and excipiable. I agree with this argument that a proposed amendment will not in any way prejudice the Defendants. This Court has, in the first place, not been told that such an amendment will prejudice the Defendants. Secondly, this Court has not been told that the Defendants have already pleaded to the POC of the Plaintiff. Therefore, the Defendants still have an opportunity to plead to the Plaintiff's POC. There exists for the Defendants an opportunity to answer to the Plaintiff's amended POC. They can, in their plea, either admit or deny or confess and avoid all the material allegations contained in the combined summons including the contemplated amendment. In my view, the Defendants can therefore not be prejudiced by such an amendment. He

has argued furthermore that there is no "bar" under the present circumstances for the Plaintiff to seek to introduce a new cause of action. It is correct.

[17] In order to succeed with its application to amend its POC, the Plaintiff must satisfy the following requirements:

17.1 that the application for amendment is not *mala fide*;

17.2 that such an amendment would not cause an injustice to the Defendants which cannot be compensated by an order of costs in respect of such an amendment, in other words, unless the parties cannot be put back, for the purposes of justice, in the same position as they were when the pleading which is sought to be amended, was filed;

17.3 the primary object of allowing an amendment is to obtain proper ventilation of the dispute between the parties, to determine the real issues between them so that justice may be done.

[18] It is important to note that according to the authors Herbstein & van Winsen, p. 290-292:

"An amendment cannot be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is timeously made some reasonably satisfactory account must be given for the delay. Of course if the application to amend is mala fide or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application would not be granted."

"In equal measures an objection to an amendment will most likely be upheld if the objector or in casu, the Defendants, can prove that:

1. *the amendment is mala fide;*
2. *the amendment causes an injustice to them, that cannot be compensated by an appropriate order of costs; and*
3. *the primary purpose of the amendment is not to obtain a proper ventilation of the issues."*

[19] Now, in his founding affidavit, David Craig Thompson, an attorney employed and practising at Thompsons Attorneys deposed to the founding affidavit in the application for amendment. The said attorneys have not offered any explanation why it is necessary to amend the particulars of claim. He has furnished no explanation in the said affidavit why he has failed to take the Court into its confidence and to explain to the Court what actually necessitated the need to amend the particulars of claim. As long as the Plaintiff satisfies the requirements for obtaining the order to amend, the Court can condone failure by the Plaintiff's attorneys to give a reasonable account for the need to amend its particulars of claim or any pleading. Accordingly, if the Court is satisfied that the application for amendment is not mala fide; that the other party will not be prejudiced by the granting of the order to amend, or if such an order can be counterbalanced by an appropriate order of costs and if the Court is satisfied with the genuineness of the amendment, the Court may condone the failure by the Applicant to explain the need for the amendment.

[20]

20.1 In the first place, the rules of Court contain the elementary principles of pleading. Wessels J, as he then was, explained these general principles of pleading in **Benson and Simpson v Robinson 1917 WLD 126 at p. 130**:

"The plaintiff must not set out the evidence upon which he relies, but he must state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in Court and tender evidence to disprove the plaintiff's allegations."

20.2 Rule 18(4) of the Uniform Rules of Court provides that:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

20.3 The Plaintiff's claim must therefore be framed in such a manner as to enable the Defendant to know the exact case he has to meet.

[21] Accordingly, the primary purpose of the Plaintiff's amendment is to set out the real issues between the Plaintiff and the Defendant so that justice may be done. In other words, the purpose of amending paragraph 4 of the POC is to establish the real issues in dispute between the parties to purify the case so as to enable the Defendant to identify the actual point in dispute. An amendment should be granted if its purpose leads to a proper ventilation of the issues. See **Kasper v André Kemp Boerdery CC 2012 (3) SA 20 WCC**. A Court should, where the aim of the amendment is to put the parties on an even keel as far as the grasping of the issues in dispute is concerned, be slow to refuse the application for amendment.

[22] It is not the Defendant's case that the Plaintiff's intended amendment is mala fide nor is it not designed to clarify the issues in dispute between the parties. It is furthermore not the Defendants' case that, if granted, the amendment will prejudice the

Defendants. The Defendants case is that, if granted, the amendment will be excipiable.

[23] On the other hand, Adv Stevens argued that the contemplated amendments constitute the terms of the oral agreement between the parties. He contended that, in the circumstances, the Defendants have no valid reason to object to the amendments. In amending the POC, so argued Mr Stevens, the Plaintiff is merely expanding what is already before the Court.

[24] Finally, on this point Adv Stevens argued strongly that the Defendants' objection is unsubstantiated in that the Defendants have not furnished any reason why they contend that the introduction of an amendment will be excipiable and that it will introduce a new cause of action. For this reason, the objection should be dismissed, so he argued. According to Adv Stevens, the duty is on whoever objects to a contemplated amendment, not only to raise an objection but also to furnish reasons for such an objection. *In casu*, the Defendants' only have raised an objection but have failed to support it with reasons. In the circumstances, the objection cannot be upheld.

[25] In the preceding paragraph, I pointed out that Adv Stevens argued that the Defendants' objection that the amendment will establish a new cause of action has no merit. His approach was that it did not matter whether it was a new cause of action or not. If the Defendants want to raise a special plea they can do so. Adv Stevens seemed to overlook the fact that if the grounds of objections are appropriate to an exception, which in my view they are, the application is dealt with as if it is an exception. The reason for doing so is that to allow an amendment with the full knowledge that the Defendant will meet it with an exception does not make much

sense. See in this regard **Manyatshe v South African Post Office Ltd [2008] (4) ALL SA 458 (T)**. In **De Klerk & Another v Du Plessis & Others 1995 (2) SA 40 (TPD)** the Court had the following to say in this regard:

"Whether a pleading would or would not be excipiable is a matter of law which should be decided by the Court hearing the application for amendment. It would be incorrect, in my view, to hold that it is arguable that the amendment would not render the pleading excipiable, allow it, and send the parties away to prepare another battle on exception on the same point."

[26] His view is that the amendment of paragraph 11.3 of the POC does not introduce a new cause of action. It is merely an expansion of what is already before the Court. I am of the view that the position is different here, that there is no introduction of a new cause of action, and that the amendment of paragraph 11.3 merely amounts to a clarification of a step in the proceedings which has insufficiently or ineffectively set out the cause of action that throughout has been relied on by the Plaintiff.

[27] Counsel for the Plaintiff argued that at any rate there is no "bar" under the present circumstances for the Plaintiff to seek to introduce a new cause of action. According to him, there can be no prejudice to the Defendant in this regard because the Defendants still have an opportunity to plead to the amendment and to defend their plea at trial. I agree with him in this regard.

[28] I would follow the general approach of the Courts in this country which has always been to allow amendments where this could be done without prejudice to the other party. The judgment of **Moolman v Estate Moolman & Another 1927 CPD 27** by Watermeyer J sets out the said general approach as follows:

"The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words, unless the parties cannot be put back, for the purpose of justice, in the same position as they were when the pleading which is sought to be amended was filed."

In this Division, which at a time was called the Transvaal Provincial Division, Wessels J, as he then was, adopted the same approach in the judgment of **McDuff and Co (in liquidation) v Johannesburg Consolidated Investments Co Ltd 1923 TPD 309**. He stated as follows:

"My practice has always been to give leave to amend unless I have been satisfy that the party applying was acting mala fide, so that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise."

And he continued as follows at p. 310:

"However, a neglectful or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side; there is no injustice if the other side can be compensated by costs."

[29] In the premises, the objection is overruled and the following order is hereby made:

1. **The application for amendment is hereby granted.**
2. **The Applicant is hereby granted leave to amend its particulars of claim in accordance with the Notice Of Intention To Amend dated 2 December 2019.**
3. **The Respondents are hereby ordered to pay the costs of this application.**

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PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff/Applicant:	Adv BD Stevens
Instructed by:	Thompson Attorneys c/o Hack Stupel & Ross
Counsel for the First and Second Defendants/Respondents:	Adv LK van der Merwe
Instructed by:	Cawood Attorneys
Date on the opposed roll before Mabuse J:	26 May 2021
Date of Judgment:	1 June 2021