



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 88472/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 26 NOVEMBER 2021

SIGNATURE

In the matter between:

HELENA JANNETHA DE BEER

Plaintiff

and

UNICA IRON AND STEEL (PTY) LTD

Defendant

J U D G M E N T

This matter has been heard via a virtual platform and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

This is the judgment in an opposed application by a defendant for leave to amend its plea. The plaintiff, being the liquidator of an insolvent company, Exim Freight & Logistics Services (Pty) Ltd, opposes the proposed amendment on the basis that it allegedly involves a mala fide withdrawal of an admission.

[2] The background facts

On the plaintiff's own admission, extracted from an affidavit by her attorney filed in opposition to the application for leave to amend as well as the uncontested version of the defendant, the relevant background facts are the following:

- 2.1 The company in liquidation (Exim) traded as an import and export forwarding company. The defendant was one of its customers.
- 2.2 Exim had a trade agreement with the defendant. It also had a separate agreement with CMA-CGM Logistics (Pty) Ltd, a clearing agent (CMA).
- 2.3 The claim forming the subject matter of the disputed amendment is claim 5 of the liquidator's claims against the defendant. It is for an amount of R 216 150, 81. This was an amount for which Exim had invoiced the defendant in respect of a consignment of goods imported for the defendant by Exim and in respect of which CMA had performed clearing, storage and demurrage services. This invoice was issued by Exim pursuant to it having been invoiced by CMA for an amount of R 209 776, 05 in the circumstances as set out hereunder.
- 2.4 At the time of the importation of the goods from India, Exim had fallen in arrears with its contractual payments to CMA. CMA therefore refused to release the goods of Exim's clients, including the Indian assignment of the defendant.

- 2.5 Exim sought to secure the release of the defendant's consignment by paying the R 209 776, 05 to CMA in full. CMA in turn however, appropriated some (or even all) of this amount to Exim's arrears payments and refused to release the goods.
- 2.6 By way of negotiation by its attorney, CMA released the goods directly to the defendant, upon payment of a new invoice issued by CMA to the defendant. Due to delays and increased demurrage, the amount due had increased to R 217 124, 27.
- 2.7 Shortly hereafter and, as a result of the consequences of its clearing agent having effectively closed the taps on Exim's business, it urgently filed for liquidation.
- 2.8 The bottom line of the present dispute is that the liquidators have sued the defendant for R 216 150, 81 which includes the R209 776, 05 which Exim had paid to CMA, while the defendant says that it had paid R217 124, 27 directly to CMA to secure release of its goods. The defendant's deponent summarised the position in his affidavit in support of the application for leave to amend as follows: *"To this end (i.e. to secure release of the consignment imported from India), the defendant had made payment of the sum of R217 124, 27 directly to CMA CGM on 17 November 2017. I believed at the time that this had been done on the express understanding that the defendant would quite obviously not be charged by the plaintiff for these costs, as they had been paid by the defendant and not the plaintiff. This payment directly to CMA CGM was done by the defendant as a last resort to secure the release of its goods from CMA CGM's custody, as it required the goods urgently"*.

[3] The pleadings

- 3.1 Exim was liquidated on the same day had the defendant had paid CMA and its liquidator had other ideas regarding the aforesaid version of the defendant, by ignoring the fact that the payment by Exim was not what had secured the release for the imported goods, but in fact payment by the defendant had done so. Accordingly, when action was instituted by her against the defendant, she included (as claim 5) the following claim in her particulars of claim:

“Claim 5

- 62 *On 21 August 2017 and at Tableview the plaintiff ... and the defendant ... entered into ... the fifth contract.*
- 63 *[The plaintiff agreed] to provide import clearance services in terms of the trade agreement in respect of a consignment of 106 packages that the defendant had ordered from an Indian company ...*
- 64 *On the same day an arrival notice was sent ...*
- 65 *On 30 August 2017 the plaintiff requested ... documents ...*
- 66 *The plaintiff duly performed the services requested in terms of the fifth contract ...*
- 67 *The plaintiff charged its customary rates ...*
- 68 *On 26 October 2017 the plaintiff issued invoice 1780 to the Defendant, setting out the value of its services rendered as R 216 150, 81 ...*
- 69 *On 27 October 2017 the plaintiff sent the defendant an account statement for invoice 1780 ...*
- 70 *Invoice 1780 became due and payable on 13 November 2017*

71 *Despite demand and in breach of the fifth contract, the defendant has to date failed to pay the amount of R216 158,81 in respect of the fifth contract”*

72 *In the premises the defendant is indebted to the Plaintiff in an amount of R216 150,81 in terms of the fifth contract ... ”.*

3.2 Initially, the defendant has pleaded in the relevant portion under consideration, as follows to the above:

“Ad paragraphs 62 & 63

49 *The contents of these paragraphs are admitted.*

Ad paragraph 64

50 *The contents of this paragraph are noted.*

Ad paragraph 65

51 *The contents of this paragraph are denied.*

Ad paragraph 66

52. *The contents of this paragraph are denied.*

53. *In amplification of the aforesaid denial, the defendant avers that the plaintiff, in breach of its obligations under the trade agreement and the fifth contract, delayed in making payment of amounts due to third parties, in particular CMA ... which payments were required to be made to secure the release of the goods imported by the defendant.*

Ad paragraph 67

54 *The contents of this paragraph are denied.*

Ad paragraph 68 – 71

- 55 *Save to deny that an amount of R10 216,77 became due and payable by the defendant to the plaintiff on 13 November 2017 and that non-payment by the defendant of said amount constituted a breach of the trade agreement or fourth contract, the contents of these paragraphs are admitted.*

Ad paragraph 72

- 56 *The contents of this paragraph are denied*
- 57 *In amplification of the aforesaid denial, the defendant avers that:*
- 57.1 *As a result of the prolonged non-payment by the plaintiff of the amounts due to CMA CGM, and in order to secure the release of the goods imported by the defendant, the defendant, in satisfaction of the amounts owed by the plaintiff to CMA CGM, alternatively for the benefit of the plaintiff, made payment of the amount of R217 124, 27 to CMA CGM on 17 November 2017.*
- 57.2 *The said payment was made by the defendant to CMA CGM with the knowledge of the plaintiff and subject to the agreement that the amount so paid would be offset against amounts owed by the defendant to the plaintiff for services rendered, in accordance with the terms of the agreement.*
- 57.3 *The defendant is accordingly entitled to offset the amount of R217 124, 27 against amounts due by it to the plaintiff for services rendered.*
- 57.4 *After offsetting the sum of R217 124, 27 against the sum of R216 150,80 the plaintiff was indebted to the defendant in the sum of R 973, 46”.*

- 3.3 The aforesaid plea was pursuant to the defendant's (successful) opposition to a summary judgment application.
- 3.4 During the course of litigation, the defendant, so its deponent states, realised that its initial version in opposition to the summary judgment application and in its plea, particularly in paragraphs 55 and 57 thereof, was with erroneous reliance on the incorrect invoice. Reliant on this incorrect invoice, the discrepancy between the two amounts were explained in the affidavit resisting summary judgment as follows: *"To this end, an amount of R217 124, 27 was paid to CMA CGM by the defendant on 17 November 2017. Annexured ... hereto is proof of payment evidencing same. I cannot say for absolute certain at this stage as to why the defendant made payment of the additional amount as I have yet to place my hand on the paperworks related herein, but I do believe that there was some additional changes which account for the difference of approximately R 7 500.00"*.
- 3.5 Having subsequently obtained all the "paperworks" and having done the reconciliations based thereon, the defendant now seeks leave to amend paragraphs 55 and 57 of its plea to read as follows (the material differences with the initial pleading is emboldened to facilitate the appreciation of the differences):

*"55. Save to deny that an amount of **R 216 150, 81** became due and payable by the defendant to the plaintiff on 13 November 2017 and that non-payment by the defendant of said amount constituted a breach of the trade agreement or **fifth** contract, the contents of these paragraphs are admitted.*

57 In amplification of the aforesaid denial, the defendant avers that:

- 57.1 *As result of the prolonged non-payment by the plaintiff of the amounts due to CMA CGM, and in order to secure the release of the goods imported by the defendant, the invoice issued to the plaintiff by CMA CGM was cancelled and a subsequent invoice was issued by CMA CGM to the defendant;*
- 57.2 *A copy of the invoice issued by CMA CGM to the defendant is annexed hereto marked "A";*
- 57.3 *In satisfaction thereof, and in order to secure the release of its goods forming the subject of the transaction contemplated in claim 5 from CMA CGM, the defendant made payment of the sum of R 217 124,27 to CMA CGM on about 17 November 2017;*
- 57.4 *Of the sum of R 216 150, 81 claimed by the plaintiff, R 209 776, 05 pertains to clearance charges which the plaintiff was to pay to CMA CGM but which amounts the plaintiff, in breach of its obligations under the trade agreement and fifth contract, failed to pay;*
- 57.5 *By virtue of the plaintiff's breach as aforesaid, the defendant was required to make payment of the sum of R 217 124, 27 to CMA CGM, which amount exceeds the amount claimed by the plaintiff'.*

3.6 The relevant part of the plaintiff's objection to the amendment reads as follows: *"The amendment constitutes a withdrawal of an admission for liability for claim 5. In paragraphs 57.2 – 57.4 of its plea, the defendant admits the plaintiff's claim for the sum of R 216 150, 80 ... but alleges that the amount was settled by agreement between the parties The amendment appears to allege that a material breach of the fifth contract*

by the plaintiff occurred prior to 17 November 2017, which allegation would constitute a withdrawal of the admission of the claim in the plea”.

- 3.7 The actual objection is that, on the initial plea, a claim is admitted and a set-off relied on, but no set-off may occur after commencement of winding up. On that basis the liquidators wanted to argue this simple consequence separately and even requested a separation in terms of Rule 33(4) by way of a counter-application. The amendment would deny the liquidator this opportunity and might result in the prior inability of Exim in satisfying its payment obligations to CMA to constitute a breach of its trade agreement with the defendant. The way in which CMA has dealt with the allocation or appropriation of the R 209 776, 05 which had been paid by Exim is being ignored by the liquidator. The consequence of CMA’s refusal and the fact that the defendant had paid CMA directly (in respect of a substituting invoice) might deprive the liquidator of having a claim at all in this regard. The retention of the claim by way of the initial plea is the benefit which the liquidator seeks to protect by way of objection to the amendment.

[4] The law

The parties are ad idem about what the law says about amendments:

- 4.1 A prior admission may be withdrawn by a later amendment, so long as an explanation has been furnished (by way of an affidavit) of the circumstances under which the admission had been made and the reasons for now seeking to withdraw it. See inter alia: *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1150F – H and *Schwartz. v Van der Walt t/a Sentraten* 1998 (1) SA 53(W) at 57C.
- 4.2 A court’s discretion is, however not fettered by the necessity to find that there has been an error before it can allow the withdrawal of an admission.

See inter alia *Armod v SA Mutual & Fire Insurance Co Ltd* 1971 (2) SA 611 (N) at 614F – G and *Frenkel, Wise & Co Ltd v Cuthbert* 1946 CPD 735.

4.3 The following statement by Watermeyer J in *Moolman v Estate* 1927 CPD 27 has frequently been relied on in respect of the approach to amendments: “*The practical rule adopted seeks to be that the amendments will always be allowed unless the application 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 purposes of justice in the same position as they were when the pleading which is sought to be amended was filed*”.

4.4 The “prejudice” referred to, relates to witnesses no longer being available or issues of postponement. “*The fact that an amendment may cause the other party to lose its case against the party seeking the amendment is not of itself “prejudice” of the sort which will dissuade the court from granting it*”. Van Loggenberg, Erasmus: Superior Court Practice, 2nd Edition at D1 – 334 and the cases mentioned in footnote 1 on that page.

4.5 Amendments should generally be allowed if its purpose is an attempt to place the true case of a party before a court. See *Four Tower Investments (Pty) Ltd v Andre’s Motors* 2005 (3) SA 39 (N) at paragraph 15.

[5] Evaluation

5.1 It is clear that what had occurred had been a direct payment from the defendant to CMA based on a separate, direct invoice from CMA to the defendant. This payment was necessary to secure the release of the goods imported from India by the defendant. The defendant should at least be entitled to plead those facts and to rely on them.

- 5.2 Whether the consequences of the above is that the liquidator loses an argument based on set-off or a disposition is something which has to be determined by the trial court. This includes the issue of the prior breach or inability by Exim to comply with its obligations to CMA and, consequently to the defendant, or not.
- 5.3 Whether an attorney (Pather) had, on behalf of CMA, facilitated the payment by the defendant (only) or whether he had actually brokered a set-off or simply a replacement of an obligation in a tripartite fashion, should be an issue best canvassed by oral evidence.
- 5.4 I do, however, not find any mala fides on the part of the defendant. The amendment is also long enough prior to a trial so that no prejudice in the form of a postponement is occasioned thereby. The consequence that a separation on the basis initially sought by the liquidator is no longer viable, is also not sufficient prejudice to militate against the proposed amendment.
- 5.5 In my view, the amendment will enable the trial court to adjudicate the matter on the true facts and it should be allowed.

[6] Costs

Ordinarily a party seeking an amendment, should be liable for the costs occasioned thereby, including the costs of opposition, unless such opposition is unreasonable or frivolous. In this case, the opposition by the liquidator appears to be an attempt to simply secure a procedural and litigation benefit at the costs of the true facts. It does appear, however, that Exim's attorney, who is now also the liquidator's attorney, had various meetings and negotiations with CMA's attorney prior to the payment of the "direct invoice" by the defendant. Should this matter proceed to trial, there is a prospect that the evidence of the attorneys might shed more light

on what arrangements had been made and whether there had been talk of a set-off as initially (by implication) pleaded. The extent of necessity of the amendment and the reasonableness (or not) of opposition can then easier and with the benefit of evidence be determined.

[7] Accordingly the following order is made:

1. The applicant/defendant is granted leave to amend its plea in accordance with the proposed amendment contained in its notice in terms of rule 28 delivered on 21 January 2021.
2. The Plaintiff's application for separation in respect of the unamended plea to claim 5 and the replication thereto, is refused.
3. Costs are reserved for determination at the conclusion of the trial.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 22 November 2021

Judgment delivered: 26 November 2021

APPEARANCES:

For the Plaintiff:

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