REPUBLIC OF SOUTH ARICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 12364/2012

In the matter between:

UMZALI CIVILS (PTY) LTD Applicant

And

THE CITY OF CAPE TOWN Respondent

JUDGMENT DELIVERED ON 24 JUNE 2015

RILEY, AJ

[1] On 28 June 2012, the plaintiff instituted action proceedings against the defendant; claiming payment of R14 331 1113-48, plus vat thereon, in addition to interest and costs.

[2] This is an application by the plaintiff for leave to amend its particulars of claim dated 27 June 2017 in accordance with its notice of intention to amend dated 27 January 2014. For the sake of convenience I shall refer to the applicant as plaintiff and the respondent as defendant.

3. The relevant background facts and pleadings are chronologically as follows:

3.1 It is common cause that the plaintiff's claim arose from the General Conditions of Contract for Construction Works 2004 (First Edition) as amended and supplemented by the Contract Specific Data ('the contract') concluded between the plaintiff and the defendant in respect of certain engineering and related works which the plaintiff was contracted to perform at Khayelitsha, Western Cape.

3.2 In its particulars of claim the plaintiff avers that as a result of disorder and disruption caused by the local community, execution of the works forming the subject of the agreement was brought to a standstill on 14 April 2011.

3.3 As a consequence of the disorder and disruption, the plaintiff was unable to execute the work on time and on 12 May 2011 it notified the Engineer of its intention to submit a claim for extension to time and for associated additional payment, which claim was updated monthly.

3.4 On 9 November 2011, plaintiff submitted what it refers to as its final claim in writing to the Engineer.

3.5 The defendant duly cancelled the agreement with effect from 18 November 2011 in terms of a letter of cancellation dated 29 November 2011.

3.6 In terms of paragraph 18 of the original particulars of claim, plaintiff averred that in compliance with Clause 48.5, the Engineer made a ruling in its letter dated 16 January 2012 based on plaintiff's final claim which was submitted on 9 November 2011.

3.7 In paragraph 19 of the particulars of claim plaintiff avers that in terms of the aforesaid ruling the Engineer partially rejected the plaintiff's final claim.

3.8 On 20 January 2012 and pursuant to the ruling of the Engineer, plaintiff issued a written notice of special dispute in terms of Clause 58.7 of the agreement.

3.9 On 28 June 2012 the plaintiff issued summons against defendant as hereinbefore set out.

3.10 The defendant entered an appearance to defend where after plaintiff brought an application for summary judgment on 17 September 2012.

[4] I pause to mention that in paragraph 3 of the verifying affidavit delivered in support of the application for summary judgment, Enrico Bossi, (the plaintiffs director) states that he '…*can and do verily swear positively to the facts verifying the cause of action and the amount set out in the plaintiffs summons and particulars of claim.*'

[5] Mr Newton who appeared on behalf of the defendant, has submitted that by stating the aforesaid, plaintiff had confirmed under oath that what was contained in the particulars of claim correctly reflected the nature and factual basis of the plaintiffs claim against the defendant.

[6] The summary judgment application was heard by Griesel, J on 31 October 2012 and on 7 November 2012 he delivered his judgment in which he held *inter alia* as follows:

6.1 That the plaintiff had submitted a final claim to the engineer on 9 November 2011.

6.2 That the engineer had made a ruling on 16 January 2012 in which he partially rejected the claim and ruled that plaintiff was only entitled to payment of an additional amount of R588 681-54.

6.3 That although the defendant in its opposing affidavit admitted that it is liable to pay the amount referred to in (6.2) above as certified by the engineer it denied liability for the balance of the claims.

6.4 The plaintiff was entitled to summary judgment in the admitted amount, together with interest and that defendant is entitled to defend the balance of the claim.

6.5 Summary judgment is granted in favour of the plaintiff for payment of R588 681-54 plus interest at 15.5 per annum.

6.6 Defendant is granted leave to oppose as far as the balance of plaintiffs claim is concerned.

[7] Plaintiffs notice of intention to amend its particulars of claim which is the subject matter of this dispute reads as follows:

> '***KINDLY TAKE NOTICE THAT*** *the above-named Plaintiff hereby gives notice in terms of Rule 28 of its intention to amend its particulars of claim in the manner set out below (portions in* ***[ ]*** *to be deleted and portions underlined to be inserted).*
>
> ***TAKE NOTICE FURTHER THAT*** *unless written objection against the proposed amendment is delivered within 10 days of this notice, the amendment will be effected.*
>
> 1. *Section 5.5 as follows:*
>
>   *"The site of the works is situated in* ***[Khayelitsha]*** *Khayelitsha in the vicinity of Mew Way Road."*
>
> 2. *Section 6 as follows:*
>
>   *"Plaintiff* ***[duly complied with all the material terms of the agreement and]*** *commenced construction when the site of the works was handed over by Defendant to Plaintiff during or about 7 April 2011."*
>
> 3. *Section 11 as follows:*
>
>   *"On 9 November 2011, Plaintiff* ***[duly in terms of clause 48, 54 and 42 of the agreement submitted its final claim]*** *submitted a settlement proposal for a mutual cancellation of the agreement in writing to the Engineer. Find attached a copy thereof marked* ***Annexure "K4".***
>
> 4. *Section 15 as follows:*
>
>   *"Payment of additional time-related items General in terms of clauses* ***[42.4,]*** *54.3* ***[,]*** *and 54.4.5 of the agreement …"*

5. *Section 16 as follows:*

   "Payment of increased Cost incidental to the disorder and disruption in terms of clauses 54.3 and 54.4.5 …"

6. *Section 17 as follows:*

   Payment for loss of profit in terms of clauses 54.3 and 54.4.5 of the agreement …"

7. *Section 18 as follows:*

   "[In compliance with clause 48.5 the Engineer made a ruling in its] *In a letter dated 16 January 2012 the Engineer provided its views regarding* ***[based on]*** *Plaintiff's* ***[final claim]*** *settlement proposal submitted on 9 November 2011 (annexure "K4"). Find attached a copy of the letter dated 16 January 2012 marked* ***Annexure "K6".***

8. *Section 19 as follows:*

   "In terms of the aforesaid ***[ruling]*** *letter, the Engineer recommended that Plaintiff's settlement proposal be partially rejected* ***[partially rejected Plaintiff's final claim as submitted. (annexure "K4")]***

9. *Section 20 as follows:*

   "Pursuant to the aforesaid ruling,] *Plaintiff issued a written Notice of Special Dispute on 20 January 2012 in terms of clause 58.7 of the agreement. Find attached a copy thereof marked* ***Annexure "K7"****."*

It is not necessary for the purposes of this judgment to repeat the contents of the annexures referred to in the notice of intention to amend.

[8] Defendant objected to the proposed amendments on the basis that:

8.1 The defendant admitted to payment of the sum of R588 681-54 to the

plaintiff in the summary judgment application on the basis that this liability arose from a claim that had been submitted to the Engineer by the plaintiff and ruled on by the Engineer in terms of the provisions of the agreement annexed to the particulars of claim.

8.2 The effect of the proposed amendment if granted, will be to change the plaintiff's cause of action from one based on the result of the Engineers ruling on a claim, to one based on the engineers partial rejection of a settlement proposal annexed to the particulars of claim. (my underlining)

8.3 Had the plaintiffs cause of action been pleaded in the manner formulated in the proposed amendment at the outset, the defendant would certainly not have admitted liability towards the defendant for payment of the sum of R588 681-54, but would have denied liability in *toto* (and thus resisted the summary judgment application) on *inter alia* the basis that the agreement between the parties relieves the defendant from any liability in the event that the plaintiff should fail to submit an appropriate claim.

8.4 The defendant will accordingly suffer serious prejudice that cannot be cured by an appropriate order as to costs or a postponement in the event that the proposed amendment should be granted unless the plaintiff procures the rescission of the summary judgment and repays all the monies received by it in satisfaction thereof with interest.

[9] In its opposing affidavit the defendant further avers that should the proposed amendment be granted that:

a) Its response to the summary judgment was based on the fact that it admitted the facts pleaded by plaintiff in paragraph's 3, 18 and 19 of its particulars of claim, namely that a final claim had been submitted and ruled upon by the Engineer and that the defendant accordingly owed plaintiff the sum of R588 681-54 in terms of the engineers ruling. (my underlining)

b) It would never have admitted liability for the aforesaid amount if the plaintiffs claim had been pleaded in the manner formulated in the

proposed amendment from the outset.

c) Defendant would have denied liability in *toto*, because in such event, it would have been clear that no claim had in fact been submitted in terms of the agreement relied upon by the plaintiff. According to the defendant this would have meant that it was absolved from all liability in terms of clause 48.4 of the agreement which provides that if the contractor i.e. the plaintiff, fails to deliver its claim within the period provided for by clause 48.1 read with clause 48.2, the employer i.e. the defendant, shall be discharged of all liability in connection with the claim.

d) To allow the proposed amendment would result in a situation where it would have effectively been induced to admit liability for payment of the sum of R588 681-54 based on a misrepresentation of the plaintiffs cause of action as contained in its existing particulars of claim.

e) As a consequence, the defendant will have suffered serious prejudice that cannot be cured by a cost order.

f) In its present form plaintiffs claim falls to be determined in accordance with clauses 48 and/or 54 of the agreement and the effect of the amendments, if granted, would allow the plaintiff to found its claim on something other than the agreement which claim defendant avers would have become prescribed and/or be excipiable.

[10] Mr de Waal who appeared on behalf of plaintiff, contended on the whole that it could not be said that the proposed amendment can prejudice the defendant in any way, as the objection is not premised on a legal ground. In his view the plaintiffs original particulars of claim sets out that the plaintiff submitted its final claim in writing to the defendants appointed consulting engineer and principal agent on 9 November 2014 in accordance with clause 42, 48 and 54 of the contract. According to him the difficulty is that some of the clauses upon which plaintiff basis its claim relate to matters where a '*ruling*' is to be sought from the engineer as a manner of enforcement whereas in others there is no provision for such ruling and that clause 58.7 relating to special disputes constitutes the enforcement mechanism.

[11] He conceded that the plaintiffs particulars of claim in its present form is

ambiguous as plaintiff initially avers that the engineer issued a ruling in terms of clause 48.5 of the agreement and that in the ruling the engineer partially granted and partially rejected the plaintiffs claim whereas in the next paragraph it is stated that plaintiff issued a written notice of special dispute on 20 January 2012 in terms of clause 58.7 of the agreement.

[12] Accordingly, and in his view, the particulars of claim are unclear as to whether plaintiff seeks to enforce a ruling or whether it calls for the adjudication of a special dispute or whether the two were pleaded in the alternative.

[13] In its affidavit in support of the amendment, plaintiff avers that all that is sought to be achieved was to clarify the particulars of claim which it avers is not based on the ruling by the Engineer. Plaintiff avers further that it is apparent from annexure "K4" to the particulars of claim that what the plaintiff submitted to the engineer on 9 November 2011, was not a claim but rather a '*settlement proposal for a mutual cancellation of the agreement*'. In support of this averment, it relies on the following:

1. The letter (i.e. annexure "K4"), in its preamble refers to the words, 'amicable settlement proposal …'
2. That it was evident from the letter that a meeting was held on 25 October 2011 where it was agreed that plaintiff would submit an amicable proposal to defendant for its consideration.
3. The letter contains an offer by the plaintiff.

[14] Plaintiff avers that the letter from the Engineer cannot be constructed as a ruling in terms of the powers of the engineer, as the engineer was *functus officio* and/or had become redundant after the agreement was cancelled and that the engineer was not in a position to make rulings.

[15] In regard to the Engineers letter dated 16 January 2012, it was contended by Mr De Waal that:

1. The letter is made in response to the offer made by plaintiff as it makes

reference to the offer.

2. The Engineer specifically states that 'we would argue that an amount of R588 681-54 over the amount already paid in IPC no 5 be paid to Kualani Civils in final settlement.
3. The letter is a counter offer to the applicants offer.

[16] According to plaintiff it must be clear from plaintiff's notice of special dispute dated 20 January 2012 that there was no ruling from the Engineer.

[17] Mr De Waal contended, that based on the averments made by the plaintiff hereinbefore, that it must be so that all the parties accepted from the outset that there was no request for a ruling by the Engineer. No such ruling could have been made because the agreement had been cancelled by the time the Engineer supposedly made the ruling and that the notice of dispute was not in respect of any such ruling. He accordingly contended that based on the correspondence, the defendants objections should be dismissed.

The applicable legal principles

[18] It is trite law that the tendency of our courts have been to allow amendments where this can be done without prejudice to the other party. The court in considering the grant and/or refusal of an application for the amendment of a pleading has a discretion to do so, and such discretion must be exercised judicially in the light of all the facts and circumstances. See: Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa ed 5 Vol 1 p 678; **Thekwini Properties (Pty) Ltd v Picardi Hotels Ltd** (and others as third parties) 2008(2) SA 156(D).

[19] It is accepted law that amendments will be allowed unless the application to amend is *mala fide* or unless the amendments would cause an injustice to the other side which cannot be compensated by costs or unless the parties cannot be put back in the same position as they were when the pleading which is sought to be amended was filed. See **Moolman v Estate Moolman** 1927 CPD7. Similar sentiments, are expressed in **Macduff & Co (in liquidation) v Johannesburg Consolidated Investment Co** Ltd [1923 TPD 309] where the court placed reliance on **Rishton v**

Rishton [1912 TPD 718].

[20] The primary consideration in applications of this nature seems to be whether the amendment will cause the other party prejudice which cannot be cured by an order for costs and where appropriate a postponement. Together with this consideration it is of course necessary to bear in mind that the primary object of allowing an amendment is '*to obtain a proper ventilation of the dispute between the parties*'. See **Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd** 1967(3) SA 632(D) at 637A - 641 (C).

[21] A further important principle is that amendments are not granted as a matter of right. The applicant must offer an explanation for why the amendment is required and if it is not done timeously, it must advance a reason for the delay.

Discussion

[22] In the present matter defendant has not accused the plaintiff of acting in bad faith. The crucial issue to consider is whether or not the amendment will result in the kind of prejudice as has been described by the authorities hereinbefore.

[23] Mr De Waal contended that since the defendant admitted that it was indebted to plaintiff in the amount of R588 681-54 it cannot now, as he put it, '*opportunistically hinge its liability to plaintiff on the formulation of plaintiff's' claim'*. In his view, what defendant seeks to do is in effect to claim prejudice an account of the fact that it can no longer deny liability of that which it acknowledged it to be due to plaintiff. He submitted that a litigant can never be prejudiced by paying a debt which the litigant concedes is due.

[24] He argued further that this court ought not to allow the defendant to rely on the additional grounds of objection as raised by the defendant as they were not listed in its notice of objection. He however conceded that the new grounds do not take the matter any further. According to him the effect of the amendment was not to alter the facts but rather aimed at bringing the particulars of claim in line with the true facts, meaning and purpose of the correspondence referred to above.

[25] I have given careful considerations to the submissions made by both the parties.

[26] What stands out is that the information i.e. that plaintiff now seeks to rely on must have been available to it at the time it drafted its original particulars of claim and before it commenced with action in this matter. I am satisfied that plaintiff committed itself to the facts and averments as is contained in the particulars of claim when it proceeded with the summary judgment application. It ultimately obtained summary judgment in the amount of R588 681-54 based on those facts and averments.

[27] It is clear to me that the defendant proceeded to deal with the summary judgment application on the basis of the averments as contained in the particulars of claim as they presently stand. It is further clear that on a reading of the particulars of claim that plaintiff specifically avers that it submitted its final claim in writing to the Engineer and that in compliance with clause 48.5 the engineer made a ruling based on plaintiffs final claim.

[28] In my view it is an oversimplification of this crucial issue to now argue that there is no prejudice to defendant because '*the defendant was either indebted to the plaintiff in the sum of R588 681-54 or not*' and that a litigant can never be prejudiced by paying a debt which it concedes is due.

[29] As I have stated, a consideration of the pleadings as they stand, leads to the logical conclusion that the defendant conceded its liability to pay the sum of R588 681-54 on the basis of the case as pleaded in the particulars of claim i.e. that the sum of R588 681-54 had indeed formed part of a final claim submitted to and ruled upon by the Engineer in terms of the agreement entered into between the parties. It must therefor be so that the acknowledgement of indebtedness was made based on the admission of the material facts as pleaded in the particulars of claim. I have no doubt considering the content of the relevant clauses of the agreement, that had the plaintiff formulated its particulars of claim in the manner envisaged by the proposed amendment at the outset, that the defendant would not have admitted

liability for any portion of the claim considering the defences that are available to defendant as set out *inter alia* in paragraphs 8 and 9 hereinbefore.

[30] I agree with Mr Newton that should I allow the proposed amendment, then in that event, the defendant will be denied the opportunity to challenge its liability to pay a substantial sum of money to the plaintiff despite the fact that defendant contests the actual basis (which was only communicated in the notice of intention to amend) on which the plaintiff asserts its claim thereto.

[31] I am also not persuaded that the plaintiff has provided a reasonable and proper explanation for the extremely long delay in bringing this application. What is of further concern is that the application is brought only after summary judgment was granted as far back as 31 October 2012. I am mindful that defendant has not accused the plaintiff of *mala fides* and that even though there are hints of negligence and/or carelessness on the part of the plaintiff that '*the amendment should be allowed if it can be made without injustice to the other side*'. See Macduff & Co (in liquidation) v Johannesburg Consolidation Investment Co Ltd *supra* and the authorities quoted in that matter.

[32] It is plain to me that plaintiff has no intention of agreeing to a rescission of the judgment it obtained against the defendant, nor does plaintiff have any intention to repay to the defendant the sum that was paid to it in accordance with the judgment.

[33] Having regard to the considerations of prejudice or injustice to the defendant, I am not persuaded that the prejudice which will be suffered by the defendant can be cured by a cost order and/or by a suitable postponement. In my view this matter falls squarely within the category of matters where the defendant cannot be placed back '*for the purposes of justice*, *in the same position'* as it was when the pleading which is sought to be amended, was filed.

[34] As a result of the prejudice and injustice that will be caused to the defendant should I grant the relief sought, I am satisfied that the plaintiff cannot succeed with its application.

[35] Accordingly I make the following order:

The application for leave to amend is dismissed with costs.

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RILEY, AJ