IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 11008/2019

In the matter between:

GEECO INVESTMENTS (PTY) LTD Applicant

and

GOURMET CAPE DISTRIBUTORS (PTY) LTD Respondent

Coram: Justice J Cloete

Heard: 1 November 2022, supplementary note delivered 9 November 2022

Delivered electronically: 25 November 2022

JUDGMENT

CLOETE J:

Introduction

[1] This is an opposed application in which the applicant seeks leave to supplement its founding affidavit and amend its notice of motion in the main proceedings to introduce additional relief (the purpose of the supplementary founding affidavit is to support that additional relief).

[2] The background to the current application is as follows. On 28 June 2019 the applicant launched the main proceedings by way of application for payment of R713 700 plus interest and costs. The respondent delivered its answering affidavit on 12 August 2019. Thereafter, and on 18 November 2019, an order (*'the referral order'*) was granted by agreement in the following terms:

> *'1. The application is referred to trial;*
>
> *2. The notice of motion shall stand as a simple summons;*
>
> *3. The applicant shall deliver a declaration on or before 15 November 2019;*
>
> *4. The respondent shall deliver its plea on or before 13 December 2019;*
>
> *5. Costs shall stand over for later determination.'*

[3] After the exchange of pleadings envisaged in the referral order, the matter came before Saldanha J. At the close of the applicant's case the respondent applied for absolution from the instance with costs.[1] On 17 September 2021 the learned Judge handed down judgment granting the relief sought by the respondent. The applicant did not apply for leave to appeal the Saldanha J order. The present application was launched on 24 November 2021.

Whether the applicant has followed the correct procedure

[4] It is first necessary to consider whether it is still open to the applicant to amend its notice of motion, given the parties' agreement in paragraph 2 of the referral

[1] The respondent also delivered a counterclaim, to which the applicant pleaded, but this was not persisted with in light of the absolution application.

order that this *'shall stand as a simple summons'.* In the answering affidavit the respondent's deponent contended that *'the motion proceedings have been superseded by the action proceedings. The wrong procedure is being followed. The applicant should have given notice of intention to amend the declaration'.* The applicant submitted that this contention is without merit, since the additional causes of action which it now seeks to introduce were not issues that were referred to trial, and thus not dealt with in the pleadings which followed the referral order.

[5] Neither party specifically considered whether or not it is competent for this Court to grant an amendment to a simple summons (which is what the notice of motion became in light of the referral order). Counsel were thus afforded the opportunity to do so by way of supplementary notes. I was thereafter informed that neither were able to find any authority on the point, but they drew my attention to *Absa Bank v Janse Van Rensburg*[2] where a full court of this division referred to *Icebreakers No 83 (Pty) Ltd v Medicross Health Care Group (Pty) Ltd* [3] in which it was held that a simple summons is not a pleading.

[6] In *Icebreakers* the Court considered whether it is competent to note an exception to a simple summons. Pertinent for present purposes are the following passages from the judgment:

> *'[9] Rule 18(4) is, if anything, even more destructive of the defendant's contentions. It provides that every pleading shall contain a clear and concise*

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2 2013 (5) SA 173 (WCC) at paras [4] to [5].
3 2011 (5) SA 130 (KZD).

> *statement of the material facts upon which the pleader relies for the claim, with sufficient particularity, to enable the opposite party to reply thereto… a party receiving a simple summons does not reply to the summons, but awaits service of a declaration to which the defendant responds by way of plea. It follows plainly that a simple summons does not have to comply with rule 18(4). The logical inference to be drawn from the fact that it does not need to comply with the fundamental rules governing pleadings is that this is so because it is not a pleading. That is consistent with the view of the authors of Herbstein & Van Winsen, who say that a simple summons is not a pleading.*
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> *[10] The summons serves the function of commencing the litigation and bringing the defendant before the court. The pleading, whether by way of particulars of claim or declaration, contains the statement of the case…'*

[7] Rule 28 of the uniform rules of court prescribes the procedure to be followed for amendments to *'pleadings and documents'*. Rule 28(1) provides that any party desiring to amend *'any pleading or document other than a sworn statement, filed in connection with any proceedings'* must follow the steps set out in that rule. Unhelpfully a *'document'* is not defined. Assuming however that a simple summons constitutes a document, what *Icebreakers* makes clear is that the amendment sought will not assist the applicant in pursuing the additional relief it now seeks to introduce.

[8] I say this for two principal reasons. First, even if the amendment sought is granted, the respondent will not be required to plead to anything until the applicant serves an amended declaration. Second, the applicant agreed to a referral to trial rather than to oral evidence on specified issues. This distinction

is important since the consequences are different, as was highlighted by the Supreme Court of Appeal in *Lekup Prop Co No 4 v Wright*:[4]

> *'[32] …It will be recalled that the appellant initiated motion proceedings and that the matter was referred to trial after the respondent had filed his answering affidavit. At the trial the respondent was allowed to read from that affidavit and did so, extensively. That was not the correct procedure… Affidavits filed may of course be used for cross-examination and also as proof of admissions therein contained, but (save to the extent that they contain admissions) they have no probative value; and in the absence of agreement, they do not stand as the witness's evidence-in-chief or supplement it… A referral to trial is different to a referral to evidence, on limited issues. In the latter case the affidavits stand as evidence, save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.'*

[9] Given the agreement to refer the main proceedings to trial, I do not see how it will assist the applicant to supplement its founding affidavit in support of the additional relief it seeks because, even if it does so, the proverbial horse has bolted since the exchange of affidavits has come and gone. It will not be incumbent upon the respondent to file an answering affidavit, and the probative value of such a supplementary affidavit will fall within the confines outlined in *Lekup Prop Co.*

[10] The respondent's other primary contention is that this application is in any event premature, since the applicant has not applied for leave to reopen its case. The

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4 2012 (5) SA 246 (SCA).

applicant disagrees, maintaining that it has followed the approach in *African Farms and Townships Ltd v Cape Town Municipality*[5] where it was held that:

> *'As pointed out in Purchase v Purchase 1960 (3) SA 383 (N) at 385, dismissal and refusal of an application have the same effect, namely a decision in favour of the respondent. The equivalent of absolution from the instance would be that no order is made, or that leave is granted to apply again on the same papers.'*

[11] This issue was comprehensively dealt with by Tuchten J sitting as a court of first instance in *Liberty v K & D Telemarketing*[6] as well as the decision of the Supreme Court of Appeal in the same matter.[7] In *Liberty* the issue was whether, after an order of absolution at the end of a trial, the plaintiff was entitled to reopen its case to pursue its original claim on the same pleadings (seemingly to avoid a plea of prescription). Dismissing the application, Tuchten J held as follows:

> *'[19] There are to my mind a number of reasons why the present application cannot succeed. I think the most important is that the argument presented on behalf of the plaintiff wrongly characterises the courses of action available to a plaintiff against whom absolution has been decreed after the conclusion of the defendant's case. A plaintiff in such circumstances always has the right to bring further proceedings to enforce his claim. He may do so by instituting proceedings afresh. For that he does not need the leave of the court.*
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> *[20] He may also do so by proceeding on the same papers. He needs the court's permission to do that. But whichever route is followed, such a plaintiff must proceed afresh (de novo)…'*

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5 1963 (2) SA 555 (A) at 563E-F.
6 2019 (1) SA 450 (GP).
7 (1290/18) [2020] ZASCA 41 (20 April 2020).

[12] On appeal, counsel on behalf of Liberty relied on *African Farms* for its submission that it was entitled to reopen its case on the same papers. The appeal court contextualised *African Farms* as follows:

> *'[13] …That dictum relates to motion proceedings. In motion proceedings, usually in unopposed matters, an applicant might be given leave to approach a court on the same papers, supplemented if so advised. That is not an order susceptible to appeal. It is no authority for the proposition that it is permissible, after an order of absolution from the instance, to reopen under the same case number on existing pleadings. The only equivalence is that in either instance a defence of res judicata could not be raised. This would be so when an action is instituted de novo or when the application, in terms of leave having been given, is brought on the same papers, supplemented, if so advised. That is what the dictum in African Farms was conveying.'*
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> [my emphasis]

[13] Although in *Liberty* absolution was granted after conclusion of the defendant's case, I do not understand the principle to be any different when such an application is made at the close of a plaintiff's case, and although the applicant is referred to as such in these proceedings, for purposes of the trial it was clearly the plaintiff. If a plaintiff is required to obtain leave of the court to reopen its case after absolution (unless it proceeds afresh) the relief currently sought by the applicant would be premature.

[14] Of course the distinguishing feature between *Liberty* and the present matter is that the applicant is not seeking to pursue its original claim on issues previously canvassed on the pleadings (although one of the new causes of action, namely unjustified enrichment, was foreshadowed in the founding affidavit). But what

the applicant seeks to do does not withstand scrutiny, since it attempts to introduce additional relief by amending what has become its simple summons, and by supplementing its founding affidavit in circumstances where there is no longer an application before the court. To my mind this is impermissible.

Conclusion

[15] It follows that the respondent is correct on both primary procedural contentions. There should be no prejudice to the applicant if it follows the correct procedure by applying to reopen its case and thereafter seeking to amend its declaration (although it is likely that the respondent will object to the intended amendment). I say this because *Icebreakers* tells us that the (simple) summons *'serves the function of commencing the litigation and bringing the defendant before the court'*. I make no finding in this regard since, although there was a debate before me about possible prescription of at least one of the additional causes of action, given the applicant's stance that the present application is interlocutory in nature, it would be inappropriate for me to deal with the merits at this stage, since it would amount to prejudging matters that may well serve in due course before a different court.

[16] **The following order is made:**

'The application is dismissed with costs.'

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J I CLOETE

For applicant: Adv G Elliot SC

Instructed by: Spencer Pitman Attorneys (Mr A Pitman)

For respondent: Adv A Brink

Instructed by: Van Wyk Van Heerden Attorneys (Mr W Van Heerden)