

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

CASE NO: 12310/2021

KAAP AGRI BEDRYF LIMITED

First Applicant

TEGO PLASTICS PROPRIETARY LIMITED

Second Applicant

and

MELAPLASTICS PROPRIETARY LIMITED

First Respondent

ALBERT EDWARD SMITH

Second Respondent

In re the action between:

Case No: 12310/2021

KAAP AGRI BEDRYF LIMITED

First Plaintiff

TEGO PLASTICS PROPRIETARY LIMITED

Second Plaintiff

and

MELAPLASTICS PROPRIETARY LIMITED

First Defendant

ALBERT EDWARD SMITH

Second Defendant

WATHEN-FALKEN, AJ:

1. The Applicants seek leave to amend its particulars of claim. It is common cause that both the Applicants and both the Respondents concluded a bouquet of agreements which created a variety of legal obligations between them. These include a licencing agreement, consulting agreement, request for proposal employer's requirements and an employment agreement, all of which hold relevance to the purpose of the contractual relationships initially formed for the production of bulk plastic container bins.

2. The particulars of claim¹ and the proposed amended particulars of claim set out in broad terms the cause of action for damages in the alternative.

3. The cause of action is for damages rooted in one of three alternative breaches of agreement:

3.1 Claim 1: for damages to Second Applicant caused by First Respondent in breach of the Licence and Royalty Agreement which is a written agreement.; alternatively

3.2 Claim 2: the claim for damages to First Respondent caused by Second Respondent in breach of a written agreement entitled Terms of Reference: Consulting Services: and further in the alternative:

3.3 Claim 3: for damages to First and/or Second Applicants caused by Second Respondent in breach of a written agreement entitled Fixed Term Employment Agreement.

¹ Particulars of claim hereinafter referred to as the POC

4. The original POC was delivered on 23 July 2021.
5. On 29 September 2021 the Respondents delivered a notice to remove a cause of complaint in terms of Rule 23(1) ² together with an exception raised in terms of rule 23 (1).
6. The essence of the complaint is that the parts of the POC dealing with the alleged damages caused as a result of alleged breaches are vague and embarrassing and that part thereof justifies an exception on the basis that the applicants POC did not contain averments which are necessary to sustain the various causes of action which the Applicants have raised against the Respondents.
7. The Applicants thereafter delivered a notice to amend the original POC in terms of Rule 28(1) annexing the proposed amendment.
8. The Respondents' subsequently delivered a notice objecting to the Applicants' notice to amend and the proposed amended POC essentially on the same grounds as it did to the original POC and included an application to strike out portions of the application to amend which is said to have gone beyond what is required in the assessment of the case pleaded.
9. The grounds of the Respondents' objections to the proposed amendments are, that if amended;
 - 9.1 The particulars would still lack the averments which are necessary to sustain the Applicants' various causes of action and would render the particulars vague and embarrassing; and in addition

² High court rule 23 (1)(a)

9.2 That the amendments as set in in paragraph 27 to 27.4 of the proposed amendments would render the particulars excipiable on the basis that it is not supported by the terms of the Consulting agreement and the contract of Intent respectively.

10. It is trite that an exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action; it goes to the whole cause of action , which must be demonstrated to be vague and embarrassing.³ Further thereto, an exception cannot be sustained unless the excipient demonstrates that he would be seriously prejudiced if the offending allegations are not expunged.

11. The issue therefore falling to be determined is whether the Applicants should be granted leave to amend its particulars of claim attached to its summons in the manner it proposes.

12. The competing rights being, the right of the Applicants to amend its pleadings, where such amendment is not mala fides; and the right of the Respondents to object to the amendment where such amendment may cause prejudice to the respondent. Ultimately, this Court has a discretion to allow or disallow the amendments holding the interest of justice and sanctity of trial time as its yardstick.

13. The primary object of allowing an amendment is '*to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done...*'⁴

14. This view must be contrasted with the courts inclination to disallow an amendment if such amendment is not made in good faith or done for the sole purpose of prejudicing the opposing party; or in cases of obvious injustice to the opposing party.

³ Jowell v Bramwell-Jones 1998(1) SA836 (W)

⁴ Cross v Ferreira 1950(3)SA443(CPD) at 447

15. The Applicants have contextualized its proposed amendments in its heads of argument as follows:

15.1 *KABL, of which Tego is a wholly-owned subsidiary, carries on business in the agricultural, fuel and related markets in Southern Africa.*

15.2 *From 2017 onwards, the Applicants engaged the Respondents in order to establish a large machine injection moulding manufacturing plant in Cape Town for the initial purpose of producing large plastic bulk bins for use in the post-harvest phase of the fresh produce / agricultural value chain.⁵*

15.3 *To that end, in or about November 2018 the Applicants and the Respondents concluded the suite of three agreements mentioned above, namely:*

15.3.1 *the Consulting Agreement concluded by Smith with KABL;*

15.3.2 *the Licence Agreement concluded by Melaplastics with Tego; and*

15.3.3 *the Employment Agreement concluded by Smith with Tego and KABL.*

15.4 *However, as pleaded in the original POC and amended POC,⁶ the bulk bins thus produced are (inter alia) sub-standard, of poor quality, structurally defective, and not fit for purpose. For example, even though they are contractually required to be stackable up to a height of eight fully-loaded bulk bins, at such a height bulk bins and stacks ultimately collapse.*

15.5 *As a result, the Applicants have suffered damages in excess of R100 million.⁷*

⁵ See p 76 for the initial design of the bulk bin (annex POC1 to the original POC).

⁶ Original POC paras 42-44 pp 66-68; amended POC paras 45-47 pp 20-22.

⁷ Original POC paras 46, 49 and 52 pp 68-72; amended POC paras 49, 52 and 55 pp 23-27.

15.6 Accordingly, in both the original POC and amended POC, the Applicants pleaded three alternative causes of action, as summarized above in paragraph 4, namely, claim 1 (i.e., Tego sues Melaplastics for breach of the Licence Agreement), claim 2 (i.e., KABL sues Smith for breach of the Consulting Agreement), and claim 3 (i.e., Tego and KABL sue Smith for breach of the Employment Agreement).

15.7 Obviously, it is for the Applicants to prove at trial (i) whether Melaplastics breached the Licence Agreement, whether Smith breached the Consulting Agreement, or whether Smith breached the Employment Agreement, and (ii) in one of these events, what damages, if any, were suffered by Tego or KABL as a result of a proven breach.

15.8 Plainly, both (i) and (ii) are matters for evidence.

15.9 Each such claim would stand on its own feet and would have to be proved independently of any other claim.

15.10 It is not part of the Applicants' pleaded case that the same damages could ever be awarded more than once, for example to Tego under both claim 1 and 3; or to KABL under both claim 2 and claim 3; or to both Tego and KABL under claim 3. That is because, to repeat, the Applicants have pleaded the three causes of action in the alternative, as they are entitled to do.

16. The Respondents' objection to the proposed amendment is multi-pronged which is detailed in its heads of argument insofar as it relates to the various contracts entered into between the parties including suspensive conditions contained therein. The bite of the objections lies in the sentiment that each of the agreements self-destructs when the parties seek to conclude an agreement after the date of the suspensive conditions because of the self-contained suspensive conditions. This it is argued rings true to the main and the alternative claims. The Respondents are therefore of the view that if the Applicants do have a claim against the Respondents, it ought to be founded in an entirely new agreement (with a different cause of action).

17. Respondents are also of the view that the Applicants caused confusion in the nature of the employment and consulting agreements resulting in it being vague. The damages claimed by the Applicants are also said to be lacking in particularity in that the POC does not set out or distinguish 'who suffered what damage'. The question in this regard is of course whether its lack of detail complained of is prohibitive to the Respondents to plead or whether it is an issue to be determined at trial.

18. It is the Respondents' argument that the amendments are excipiable on the grounds of it being vague and embarrassing and that it should not be allowed.

19. The Court's approach in dealing with amendments should has always been that an application for amendment should be allowed unless that application is mala fides.

20. A locus classicus for amendment of pleadings can be found in Moolman v Estate Moolman⁸ where the court said :

"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 purposes of injustice in the same position s they were when the pleading which it is sought to amend was filed."

21. The idea is to avoid a situation where if it is refused the same parties will be brought before the same Court for determination on the same issue.

22. An Applicant must demonstrate that the proposed amendment is worthy of consideration and that it introduces a triable issue, this must then in turn be weighed up against the objection raised by the opponent to ascertain prejudice or whether the amendment would render the pleading excipiable.

⁸ 1927 CPD AT 27 AND 29

23. In exercising this judicial discretion, a Court ought not to be overly technical.⁹

24. The issue is whether the present case is without merit but for the amendment. Both Applicants argued that the application to amend was superfluously effected as a result of the Respondents' exceptions raised and not because it considered it necessary due to some or other shortcoming. The amendments were proposed to render more clarity to facilitate the Respondents' plea and ultimate progression of the matter.

25. It is trite that the excipient/objector bears the onus of persuading the Court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.

26. The question to be asked is whether the Applicants have pleaded the material facts that upon every interpretation in its summons can reasonably bear, no cause of action.

27. The preemptory requirements for the formulation of pleadings in general are set out in RULE 18(4) which provides:

“each pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity to enable the opposite party to reply thereto.”

28. The averments dealing with the breach of the agreements are dealt with in the alternative insofar as it relates to the relevant participating parties.¹⁰ The statements contain the essential averments necessary to sustain the damages action. It contains sufficient detail enabling the Respondents to plead thereto. The Applicants are entitled to

⁹ 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.”

¹⁰ See notice in terms of Rule 28 at page 226 to 254

tender its claims in the alternative and I have difficulty finding that it is impossible for the Respondents to plead thereto.

29. The Applicants set out in respect of all agreements: (i) the relationships involved; (ii) the contractual expectations; (iii) the breeches and (iv) the consequential losses incurred.

30. The Respondents' complaint in raising objection seems not to be that no sufficient material facts have been pleaded *per se*, but rather that the facts pleaded are inconsistent with the terms and conditions of the various contracts *vis a vis* the fact that the suspensive conditions were unfulfilled, and that the claims ought to have been founded on an entirely different basis.

31. This raises legal argument as regards the terms of the various agreements as well as the interpretation thereof. These are arguable points best argued at trial. My view is therefore that the respective parties' legal rights and their corresponding liabilities flowing from the suite of agreements is more a matter of argument than pleading.

32. In the result I find the objections raised are not sufficiently well founded to repulse the proposed amendment.

33. In the circumstances of this case I am of the view that the amendment should be allowed to enable the parties to ventilate themselves at trial.

I grant the following order:

[i] The Applicants are granted leave to amend its particulars of claim in accordance with the notice of intention to amend dated 20 October 2021.

[ii] The Respondents'/Excipients' exception is dismissed.

[iii] The Applicants are directed to effect the aforesaid amendment within ten (10) days from date hereof.

[iv] The Respondents shall pay the costs.

**WATHEN-FALKEN, AJ
ACTING JUDGE OF THE HIGH COURT**

CORAM (Case No: 12310/2021) : ACTING JUDGE WATHEN-FALKEN

DATE OF HEARING : 13 JUNE 2022

DATE DELIVERED (Electronically) : 19 JANUARY 2023

**COUNSEL FOR APPLICANTS : ADV. A SHOLTO-DOUGLAS SC
ADV. ALISTAIR PRICE**

INSTRUCTED BY : ENS AFRICA ATTORNEYS

**COUNSEL FOR RESPONDENTS : ADV. R STELZNER SC
ADV. MICHAEL VAN STADEN**

INSTRUCTED BY : MOSTERT & BOSMAN ATTORNEYS