THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 556/17

In the matter between:

MAGNUM SIMPLEX INTERNATIONAL (PTY) LTD **APPELLANT**

and

THE MEC PROVINCIAL TREASURY,
THE PROVINCIAL GOVERNMENT OF LIMPOPO **RESPONDENT**

Neutral Citation: *Magnum Simplex v The MEC Provincial Treasury* (556/17) [2018] ZASCA 78 (31 May 2018)

Coram: Lewis and Mathopo JJA and Hughes AJA

Heard: 15 May 2018

Delivered: 31 May 2018

Summary: Application to amend counterclaim in terms of Rule 28(1) of the Uniform Rules – claims for damages and not specific performance – amendment of counterclaim did not introduce a new cause of action – no prejudice.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mabuse J) sitting as court of first instance):

1 The appeal is upheld with costs such costs to include the costs of two counsel.

2 The order of the high court is set aside and substituted with the following:

2.1 'The defendant's amendment is granted with costs.'

JUDGMENT

Mathopo JA (Lewis JA and Hughes AJA concurring):

[1] This appeal concerns an application for leave to amend its counterclaim by the appellant (defendant in the court a quo) during the trial. The main action is still pending in the Gauteng Division of the High Court Pretoria (the high court). The trial which was set down from 28 February to 4 March 2016 proceeded before Mabuse J. After the respondent had led the evidence of several witnesses and before closing its case, the appellant served and filed a notice to amend its counterclaim by increasing the amount originally claimed from R50 315 884.87 to R250 million. The respondent objected to the amendments. The high court upheld the objection. Dissatisfied with that decision, the appellant unsuccessfully applied for leave to appeal. This appeal is with the leave of this court.

[2] The evidence led at the trial is not before us, the parties having adopted an approach that such evidence is not necessary for the proper determination of this appeal. We have, however, been able to rely on the pleadings and affidavits filed during the application for the amendment.

[3] A brief background to this matter is as follows: On 17 November 2009, the respondent issued summons against the appellant in the court a quo. In

the particulars of claim the respondent sought payment of all the amounts advanced to the appellant arising from a written contract concluded between the parties which comprised two main parts namely, a project agreement and a licence agreement.

[4] In the original counterclaim, the pleaded case of the appellant was founded on the allegation that the respondent breached or alternatively repudiated the agreement by refusing or neglecting to make payment of the licence fees as set out in schedules 1, 2 and 3 of the agreement. The appellant averred that it was entitled to claim damages from the respondent because the latter had retained parts of the Finest System Software provided by the appellant and continued using it without compensating the appellant. It further alleged that the damages claim was based on the licence agreement and included claims for interest which was to be recalculated to reflect the accrued interest instead of the initial interest claimed at the time when the original counterclaim was delivered. These claims were purely for damages. In the consequential amended special plea, plea and counterclaim it was specifically pleaded as follows in paragraphs 29.6.5 and 29.6.6.:

‘29.6.5 the plaintiff is unjustly enriched with the system;

29.6.6 the defendant has suffered damages in providing the services pursuant to the representations.’

The factual allegations underpinning the appellant’s case was unaltered. What it sought to change were only the dates, interest and the increased quantum which consequently affected the original amount claimed.

[5] In response to the appellant’s notice of amendment the respondent filed a notice in terms of Rule 28(3) of the Uniform Rules of Court, advising the appellant of its objection to the proposed amendment and setting out various grounds in support of its objection. Two of the grounds of opposition to the amendment were of a formal nature namely, that there had been an inordinate or unexplained delay on the part of the appellant in seeking the amendment. It was also contended that the amendment was not bona fide because the appellant waited for the respondent’s witnesses to testify before bringing the proposed amendment and if the amendment were granted, the

respondent would be prejudiced as it would have to recall all its witnesses. In addition, it was contended that the proposed amendment was for specific performance of a contract which was lawfully terminated. Finally the respondent submitted that the cause of action which the appellant sought to introduce did not exist at the time of the filing of the plea and thus constituted a new cause of action.

[6] The high court accepted the respondent's arguments and adopted the approach that both agreements were intrinsically linked and dependent on each other, and that termination of one included the other. It characterised the appellant's claim as one founded upon a terminated contract and reasoned that granting the amendment would be tantamount to enforcing rights or obligations from a non-existent contract. It found that because the agreement had been cancelled the appellant would not be entitled to claim any licence fees. As to the objection about the new claims or causes of action, the high court held that the old and new claims did not arise from a single source and each of the claims for payment were based on a separate cause of action with its own prescriptive period.

[7] Before us the appellant principally based its argument on three grounds. Firstly, it contended that the proposed amendment is bona fide and merely initiated to amend dates and amounts in order to update its quantification without introducing a new cause of action or amending any allegations or facts upon which its original cause of action was premised. Secondly, the proposed amendment was not predicated on the project agreement but submitted that the contemplated amendment was based on the annual licence fees and support fees together with interest as a result of the respondent's continued use of the software. The argument advanced was that the appellant had suffered damages because the respondent failed or refused or neglected to compensate the appellant for the continued use of the software despite the agreement being cancelled. Thirdly, it contended that no prejudice would be suffered by the respondent because it conducted its case on the basis that the appellant was not entitled to any compensation beyond 2008 and 2010. Finally, it was submitted that recalling witnesses who have

already testified will not affect the respondent's case and the proposed increased quantum would not disturb the respondent's pleaded case.

[8] The main thrust of the respondent's argument is that the proposed amendment was for specific performance of the lawfully terminated agreement. Furthermore, the respondent contended that the cause of action which the appellant sought to introduce did not exist at the time of the filing of the plea and constituted a new claim. The respondent submitted that the proposed amendment was not made bona fide in order to vindicate a triable issue. It argued that by allowing the amendment, it would be prejudiced and such prejudice cannot be cured by an appropriate cost order or a postponement.

[9] Against this background I turn to the issue of whether or not the high court had correctly upheld the objection. The principles applicable to this issue have been set out in numerous cases. In *Caxton Ltd & others v Reeva Forman (Pty) Ltd & another* 1990 (3) SA 547 (A) Corbett CJ stated at 565G:

'Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles.'

The following statement by Watermeyer J, as he then was, in *Moolman v Estate Moolman & another* 1927 CPD 27 at 29 has been accepted and followed as reflecting the situation in our law:

'The question of amendment of pleadings has been considered in a number of English cases. See for example: *Tildesley v Harper* (10 ChD 393); *Steward v North Met Tramways Co* (16 QBD 556) and 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 justice in the same position as they were when the pleading it is sought to amend was filed.'

In *Rosenberg v Bitcom* 1935 WLD 115 at 117 Greenberg J, as he then was, stated:

'Although it has been stated that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the

Courts lies in favour of an amendment whenever such an amendment *facilitates the proper ventilation of the dispute between the parties*.'

In *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C Henochsberg J held:

'An amendment cannot however 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 not timeously made, some reasonably satisfactory account must be given for the delay.'

Caney J stated in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A:

'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show *prima facie* that *he has something deserving of consideration, a triable issue*; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.'

And at 639B:

'The mere loss of the opportunity of gaining time is not in law prejudice or injustice. Where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused, but it should not be refused merely in order to punish the plaintiff for his neglect.'

And at 642H:

'In my judgment, if a litigant has delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment.'

[10] In my view the proposed amendment does not introduce separate causes of action, or any new cause of action. It merely seeks to add further items of damages arising from the same cause of action. Differently put, the appellant is only revising the quantification of the original claim. The original claim remained the same and unaffected by a plea of prescription. Therefore, the argument that the appellant should have instituted a separate claim because the licence fees are paid annually in advance and when each anniversary of the claim falls due is misplaced. It is unconscionable to expect the appellant to institute separate claims for each year of the default under

different case numbers. The contemplated amendment adds nothing to the case originally pleaded in the counterclaim. The original averments stood unaltered. Strictly speaking, the amendment sought is merely arithmetic. The proposed amendment is clearly distinct from an amendment introducing a new cause of action.

[11] If the amendment is granted no prejudice or injustice would occur because the parties would be put back in the same position as they were when the pleadings sought to be amended were filed. On the other hand, if the amendment is refused a substantial portion of the appellant's claim will be extinguished. On the face of it such prejudice would have the effect of disposing of the bulk of the appellant's claim before the appellant could lead evidence. The proposed amendment would not put the respondent in a worse position than it would have been if the pleading in its amended form had been filed in the first instance. There will not be any new evidence required to disprove the appellant's counterclaim. I say this because the respondent led its case on the basis that the appellant was not entitled to anything beyond 2008 and 2010 and misconstrued the fact that the applicant's claim was one of damages and not specific performance.

[12] In my view any notion that the appellant's claim was not a damages claim is negated by paragraphs 29.6.5 and 29.6.6 of the appellant's consequential amended special plea, plea and counterclaim. As correctly submitted by counsel for the appellant, the claim had always been one for damages and not specific performance. And it was founded upon the same breach which was part and parcel of the original right of action.

[13] There is one more important observation to make. As to whether the agreements are interlinked or dependent upon each other is an issue that requires proper ventilation and evaluation by the trial court. This issue cannot be decided during interlocutory proceedings.

[14] I cannot see how the granting of the amendment can cause the respondent any prejudice which cannot be cured by a costs order or

postponement. The respondent can still recall all its witnesses if necessary and proceed with the trial without any prejudice. It follows that the high court erred in refusing the proposed amendment. For these reasons the appeal must succeed.

[15] It is ordered that:

1 The appeal is upheld with costs such costs to include the costs of two counsel.

2 The order of the high court is set aside and substituted with the following:

2.1 ‘The defendant’s amendment is granted with costs.’

_____
R S Mathopo
Judge of Appeal

APPEARANCES:

For appellant:	P Mokoena SC
	E Mokutu
	Instructed by:
	Werksmans Attorneys, Pretoria
	Symington & De Kok, Bloemfontein
For respondent:	J Nxusani SC
	H C Janse van Rensburg
	Instructed by:
	Rudman Attorneys, Pretoria
	Horn & Van Rensburg, Bloemfontein