

SOUTH AFRICA / JUDGMENT

Ekurhuleni Metropolitan Municipality v NCP Chlorchem (Pty) Limited (3545/2013) [2015] ZAGPJHC 234 (23 September 2015)

[2015] ZAGPJHC 234**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Kathree-Setiloane

CASE / FILE NUMBER

3545/2013

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**IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE NO. 3545/2013
DATE: 23 SEPTEMBER 2015**

In the matter between:

EKURHULENI METROPOLITAN
MUNICIPALITY.....Plaintiff
And
NCP CHLORCHEM (PTY)
LIMITED.....Defendant

JUDGMENT**KATHREE-SETILOANE J:****INTRODUCTION**

[1] On Monday 14 September 2015 the Plaintiff (“EMM”) gave notice of its intention to amend its particulars of claim by substituting them in their entirety. This notice of amendment was the second attempt by the EMM within the last month to replace its particulars of claim in their entirety. It was preceded by a first attempt to substitute the particulars of claim on 21 August 2015. The Defendant (“NCP”) objected to EMM’s notice of amendment dated 21 August 2015.

- [2] On 11 September 2015, the EMM then furnished NCP with a new proposed amendment that would substitute its particulars of claim in a manner based on, but materially different to the proposed amendment of 21 August 2015 to which NCP had objected. On 14 September 2015, EMM then furnished NCP with a notice of intention to amend which still proposed to substitute the particulars of claim in their entirety along the lines of the 11 September 2015 draft, but with some additional details pleaded. On 16 September 2015, NCP gave notice of its intention to oppose EMM's proposed amendment of 14 September 2015.

Irreparable Prejudice to the EMM (pp 148-150)

- [3] NCP objects to the proposed amendment on the basis that the proposed amendment seeks, at an extremely late stage of the proceedings, to introduce substantial new issues into the case in a manner that will prejudice NCP that cannot be cured by a costs order against EMM or a postponement. It bears mention, at this point, that the summons in this action was issued approximately two years ago. The trial has been set down for fifteen days commencing on 27 October 2015.
- [4] The prejudice which NCP contends it will suffer, if the court were to allow the proposed amendment at this late stage of the proceedings, relates to the unsustainability of the business of NCP at the tariffs claimed by EMM. The contention advanced by NCP in this regard, is that unless the merits of the action and the parallel review proceedings are resolved at the hearing during October / November 2015, it will have to take proactive steps that may prove to be unnecessary if the review proceedings and the action are ultimately resolved in its favour.

The Existing Claim of the EMM

- [5] On the pleadings as they stand, the claim of the EMM is a statutory claim on the By-laws, and not a claim in contract. It is a claim based on the provisions of the By-laws that create statutory liability on a party that has (or is deemed to have) concluded a written consumer agreement with EMM to pay the accounts of EMM.
- [6] The issues on the existing particulars of claim are relatively narrow. These are:
- (i) The narrow factual issue of whether NCP ever concluded a written consumer agreement with the EMM;
 - (ii) The legal issue of whether EMM has any claim under By-laws 7(5) to 7(7) read with By-laws 3(2), 3(3) and the first sentence of By-law 3(1) for payment of its accounts from a party who has not concluded a consumer contract with it or whether its only proper claim against such a party is a "claim for the cost of electricity and any other costs incurred by Council in such circumstances" in terms of the second sentence of By-law 3(1); and
 - (iii) The mixed legal factual issue of whether the supply consumed by NCP at its Chloorkop plant is a supply drawn from the EMM supply main.

The Proposed Amendment

[7] The proposed amendment, however,

- (i) introduces a claim based on contractual liability in terms of an alleged tacit contract which is now pleaded
- (ii) reduces the claim under the By-laws to an alternative claim and changes it to a claim based on the second sentence of By-law 3(1) which makes parties who use a supply without concluding a written consumer agreement with the EMM liable to the EMM for “the cost of electricity and any other costs incurred by Council in such circumstances”
- (iii) extends the period of the claim past the pre-July 2012 period to the present, and
- (iv) It changes the quantum claimed to a quantum based on tariff D.

[8] NCP contends that the new claims introduce materially different issues into the case and will prevent NCP from being able to run the trial in October thereby causing it irreparable prejudice and creating the risk of material harm to the public interest. As contended for by NCP, the proposed amendments threaten to introduce a dispute over whether there was a tacit contract between the parties, and if so, what the terms of that tacit contract were; and whether, and if so when, that tacit contract was validly terminated. The proposed amendments will also introduce disputes over:

- (i) How to interpret the phrase “cost of electricity and any other costs incurred by Council in such circumstances”
- (ii) What such costs are, and
- (iii) Whether they cumulatively exceed the amount of Megaflex plus 2% which NCP has been paying EMM.

[9] All the abovementioned issues are issues which NCP does not have to traverse on the pleadings as they currently stand. As contended for by NCP, they are issues which will require NCP to prepare and to call witnesses which it did not intend to call in this trial. In relation to the issues around cost of electricity, they will probably involve substantial additional discovery and may require expert evidence. EMM points out that new issues come at a time when, as a result of EMM’s belated amendment to its replication, NCP has had to plead a rejoinder which will oblige it to lead new categories of evidence and new witnesses at the trial.

PREJUDICE TO THE NCP

[10] I turn now to consider the prejudice to NCP if the October hearing is postponed as a result of the grant of the proposed amendment. While the general policy of the courts is to encourage full ventilation of the real issues between parties, prejudice to the respondent still remains the deciding factor in determining whether to grant or refuse an application to amend (*Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989(4) SA 940). An

application for an amendment will be refused if, to allow it, would cause prejudice to the other party, which cannot be remedied by an order for costs and, where appropriate, a postponement (*Trans-Drakensberg Bank Ltd v Combined Engineering* 1967(3) SA 632 at 638).

- [11] The NCP submits that if these amendments are allowed, it will be prejudiced in its preparation for trial and is unlikely to be able to proceed with the trial on 27 October 2015. As is apparent from NCP's answering and replying affidavits in the counter application to the review application, the prejudice that will be caused to the NCP (and possibly the country at large) if the trial is postponed is enormous.
- [12] Importantly, the prejudice that NCP will suffer if the trial is postponed must be viewed in the context of the key role that it plays in the country in relation to the purification of potable or drinking water. The NCP supplies more than 90% of the liquefied packed chlorine used in the purification of South Africa's drinking water. Its electrolysis production process uses large amounts of electricity to produce liquefied packed chlorine and caustic soda in equal parts. Electricity cost is more than 50% of the NCP's cost of production in relation to an electrochemical unit (which is the equal share of liquefied packed chlorine and caustic soda with reference to which NCP measures its production output). NCP's current business at Chloorkop is unsustainable at "retail" EMM electricity tariffs.
- [13] NCP made a loss of close to R30 million rands in its 2014 financial year. The 2014 financial statements are its latest audited statements. It anticipates that its 2015 financial statements will confirm the ongoing threat to the sustainability of its business. NCP's increased production costs cannot be passed onto its consumers because the competitive South African caustic soda market will not allow NCP to sell at prices increased to take account of electricity price increases. It's new competitor Protea Chemicals is free of retail municipal electricity tariffs and now has capacity to supply 10 000 tonnes of liquefied packed chlorine into a market that is currently sitting at 22 900 tonnes (ie capacity to supply 44% of the current market). Although Protea will leave more than 50% of the South African market to be supplied by NCP, the municipalities representing that half of the market which cannot source cheaper liquefied packed chlorine from Protea will not be able to absorb increases by NCP that will have to

make up for the lost recovery of electricity cost on caustic soda (which currently brings in almost double the value of liquefied

chlorine sales),

- [14] The loss of almost 40% of its current liquefied packed chlorine market, and the loss of almost 40% of its current caustic soda output which is produced in the same process as liquefied packed chlorine will disappear if NCP has to reduce its chlorine output by 40%. Because of the toxicity and difficulty of storing liquefied packed chlorine, as Protea's market share increases NCP will not be able to keep producing at current output to feed the caustic soda market because it cannot stockpile the excess liquefied packed chlorine that it will be unable to sell into market which is supplied by Protea at cheaper rates. So each tonne of

liquefied packed chlorine that Protea takes away from NCP's market share will translate into a corresponding reduction of NCP's caustic soda sales.

[15] So unless NCP is able to free itself with certainty from providing for the cost of EMM municipal electricity tariffs, it will find itself in a financially unsustainable position within a few years. NCP cannot wait passively for this to happen, particularly now that NERSA and the EMM have doubled the 24% Megaflex premium on the NCP Special Tariff to 48%. As a result, NCP faces the following choices:

- (a) It may, through negotiation or the legal process obtain final resolution of its dispute with NERSA and the EMM on terms that enable it to continue operating on the grid from its plant in Ekurhuleni, either as a customer of Eskom paying a manageable surcharge to the EMM, or as a customer of the EMM at a tariff that is financially sustainable for NCP.
- (b) However, if it cannot obtain that resolution quickly enough, it must either
 - (i) stay at its Ekurhuleni plant and invest in new technology that enables it to generate its own electricity for its electrolyzers and thus move off the Eskom grid and free itself from the risk of being subjected to the unsustainable burden of Ekurhuleni electricity tariffs, or
 - (ii) move its plant from Ekurhuleni to another municipality or development zone that will accept that it can be a direct customer of Eskom, or even to a neighbouring state that will offer it attractive electricity arrangements.
- (c) However, if these latter options are not financially viable or practically achievable, it must shut down its operations.
 - (i) Moving off the Eskom grid or moving out of Ekurhuleni will both require substantial investment in a new plant. The weaker the balance sheet of NCP is, the less likely NCP is going to be able to raise the necessary investment. If resolution of the original action is postponed for another year, NCP must keep an impairment of R178 million plus more than three years of interest on its balance sheet in circumstances where, depending on the outcome of the parallel review application it may have to use that balance

sheet to raise the hundreds of millions of rands necessary to move out of Ekurhuleni or off the grid. EMM points to some discrepancies

between the allegations made by NCP in the urgent application and those made in answer to the counter application in the review

application regarding the figures in the financials of NCP for the 2014 financial year, as well as its ability to sustain itself in the future. NCP has provided a proper explanation for those discrepancies in its answer to the counter application in the review application. In any event, those discrepancies do not detract from the prejudice that NCP will suffer if the proposed amendment is granted.

(ii) Apart from the prejudice to NCP, a postponement caused by EMM's amendment threatens catastrophic prejudice to the public at large. If NCP's ability to resolve its conundrum through means that require substantial new investment, is impaired by another year's delay of the principal action, there will be an increased risk that NCP will have to shut down its operations.

(iii) If this takes place at any time in the foreseeable future, the country will be without sufficient liquefied chlorine to meet the water purification needs of most of its municipalities. The emergence of Protea as a competitor to NCP now means that small parts of the country may be able to keep their water clean without NCP. However, if NCP has to stop operating in the next few years, it is still likely that this would leave more than half the country without potable water within a week of the closure of NCP.

(iv) The closure of NCP would also have significant balance of payments implications for the country because of the dependence on NCP of many South African downstream manufacturers.

[16] EMM has known since NCP's letter to the Deputy Judge President of 31 March 2015 (Annexure D pp 531-538) that NCP will be prejudiced if the trial does not run in October 2015. In paragraph 19 of that letter (p 537), NCP's attorneys stated the following:

"19. Apart from the futility of the exercise proposed by the plaintiff, it is one which threatens damaging consequences for the country as a whole.

19.1.NCP produces approximately 90-95% of the liquefied chlorine that is supplied to municipalities and water boards and is necessary to purify South Africa's drinking water. The Chloorkop factory which is at the centre of the present dispute has accordingly been designated a National Key Point under Act 102 of 1980.

19.2.Because of the toxicity of liquefied chlorine, it cannot be imported on a bulk basis, nor can it be stockpiled. At present, if the Chloorkop factory were to be shut down, the country would have no more than seven days' supply of liquefied chlorine and after seven days, most water purification plants in the country would have to stop operating.

19.3.Unless the present dispute can be finalised within the next two to three years the contingent liability raised by the present action will oblige NCP to shut down the Chloorkop factory.

19.4.It is by no means clear in such an event, that NCP will be able to establish a profitable liquefied chlorine plant elsewhere, or that the country will be able to source alternative supplies of liquefied chlorine to replace the supply currently provided by NCP.

19.5.There is accordingly a material risk that if the case continues on present course without judicial case management, a point will be reached where

19.5.1. the country has no access to liquefied chlorine,

19.5.2. most municipalities in the country will no longer be able to supply purified water to their residents, and

19.5.3. outbreaks of cholera and other waterborne diseases will be likely

- [17] The letter of 31 March 2015 was written before EMM and NERSA doubled the premium that they expect NCP to pay on the Eskom Megaflex tariff. The situation now is accordingly considerably more urgent than it was when the letter to the Deputy Judge President was written.
- [18] At the pre-trial meeting of 29 March 2015, EMM had already decided that it was going to amend its pleadings and NCP indicated the need for it to do so quickly and to commit to a date for that amendment.
- [19] Nothing stopped the EMM from amending six months ago. It has known what its case in the post July 2012 claim was at least since it finalised its answering affidavit and counter-application in the review application on 30 January 2015. It could, therefore, have immediately pleaded its post 2012 claim at tariff D with an alternative claim at the NCP Special Contract tariff. Instead, it apparently elected to hold back its amendment because it wanted the tactical advantage of not pleading until it had seen NCP's replying affidavit in the review application.
- [20] EMM, will in my view, not be prejudiced if it is denied its proposed amendment. It has instituted action separately in respect of the post – July 2012 period. It may, if it so elects, deal with the issues in its proposed amendment in that second action. There is nothing that impedes it from doing so.
- [21] The nature of the prejudice, which the respondent will suffer by the grant of the proposed amendment, cannot in my view, be compensated by a postponement or a costs order. In the premises, the application for amendment must fail.

[22] In the result, I make the following order:

‘The application for amendment is dismissed with costs.’

F KATHREE-SETILOANE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: 18 September 2015

DATE OF JUDGMENT: 23 September 2015

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