

SOUTH AFRICA / JUDGMENT

Estate Agency Affairs Board v Pasco Risk Management (Pty) Limited (57926/2012) [2017] ZAGPJHC 259 (15 September 2017) [2017] ZAGPJHC 259

COURT

South Gauteng High Court, Johannesburg

BEFORE

M L Twala

CASE / FILE NUMBER

57926/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE:

57926/2012
Not
reportable
Not
of interest to other judges
Revised.
15
September 2017
In

the matter between:

THE
ESTATE AGENCY AFFAIRS
BOARD APPLICANT
And
PASCO
RISK MANAGEMENT (PTY) LIMITED RESPONDENT

JUDGMENT

TWALA J

1. Before this Court, is an applicant who seeks an order to amend its plea to the plaintiff's particulars of claim which plea is dated the 17th March 2015. The respondent filed its papers opposing the application.
2. It is common cause that in 2012 the respondent issued summons against the applicant and effected an amendment to its particulars of claim in
2014. It is further common cause that the applicant filed its plea to the respondent's particulars of claim on 17 March 2015. The applicant filed its Rule 35 (3) and (6) on the 6th June 2017 and now seeks an order to amend its plea.
3. Counsel for the applicant contended that after consultation with the applicant in preparation for trial, it became apparent that certain documents were not discovered and are necessary for trial. The applicant then served a notice in terms of Rule 35(3) and (6) requesting discovery and production of those documents. It is the respondent's reply to the Rule 35 notice which prompted the applicant to file a notice of amendment of its plea.
4. The proposed amendment, it is contended by counsel, does not shift the burden of proof resting on the respondent to prove its claim. Where the applicant bears the onus, it is prepared to discharge it. The applicant is entitled to amend its plea at any time as long as there is no prejudice to the other party and in this case there is no prejudice to be suffered by the respondent because of the amendment for it does not change its position to prove its case.
5. The agreement on which the respondent bases its claim is unlawful because it is contrary to the provisions of the section 217 of the Constitution of the Republic of South Africa, Act 109 of 1996, the Public Finance Management Act, Act 1 of 1999 and the procurement policy of the applicant. Further, it is contended by counsel, the third respondent had no mandate from the applicant to conclude any verbal contract with the respondent. If such agreement was concluded, then it is unlawful and unenforceable.
6. Counsel for the respondent contended that the applicant is mala fide in bringing this application so late in the day in this case. The applicant only pleaded in March 2015 to a summons issued in 2012. The matter is old and some of the documents may not be found. The proposed amendment completely replaces the applicant's plea on which the respondent has all along prepared its case. The proposed amendment tends to withdraw express or deemed admissions in the pleadings and the applicant has failed to furnish a reasonable explanation therefore. The respondent will need an opportunity to plead as well and this will cause further delay in bringing this matter to finality since the hearing is set down for 18 October 2017.

7. The proposed amendment, it is contended, does not disclose the section of the statute upon which the applicant intends to rely except that it refers to the empowering statute. The proposed amendment is therefore vague and embarrassing. The respondent will be prejudiced by the amendment in that it will not be placed back to the position in which it was but for the pleading. The applicant is mala fide in bringing this application for it only sprang into action just before trial.
8. It is trite law that any party desirous of amending any pleading or document other than a sworn statement may do so on notice to the other party at any time before judgment.
9. Rule 28 (10) of the Uniform Rules of Court provides as follows:

“The Court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matter as it deems fit.”

10. For a better understanding of the proposed amendment, I deem it appropriate at this stage to outline paragraph 4 of the plea and the proposed amendment thereto. I do not intend to deal with each every paragraph of the proposed amendment but only those that are in issue in this case.
11. Paragraph 4 of the applicant’s plea is as follows:

“4.1 The first defendant admits payment of certain invoices in respect of investigations rendered by the plaintiff;

4.2 The first defendant further admit that the plaintiff did deployed two body guards;

4.3 The first defendant avers that the deployment of two bodyguards was provided to the third and fourth defendant at no cost and formed part of the plaintiff’s social responsibility commitment, part of Royal Bafokeng Group of Companies as agreed between the parties;

4.4 The first defendant admit that the invoices listed herein are part and parcel of the free services rendered by the plaintiff in terms of agreement mentioned in 4.3 supra, confirmed by the Executive Director/CEO(George Nicholls) of the plaintiff in his communication to first defendant.

4.5 The first defendant denies that there is any outstanding invoices not paid in respect of written agreement between the parties, and the only invoices the first defendant refuse/failed/ignored to pay relate to free services rendered by the plaintiff.”

12. The applicant’s notice of amendment to its plea deletes paragraph 4 and replaces same with the following:

“1. Ad Paragraph 8

First Defendant admits that in respect of the services rendered for the consulting services, the first defendant paid such invoices as were properly rendered and were due and payable. First defendant denies the remainder of the allegations in this paragraph and puts the plaintiff to the proof.

2. Ad Paragraph 9

First Defendant denies that it gave a mandate to the plaintiff to conduct an assessment in relation to the safety and security of the third defendant. Such assessment, if carried out, was at the instance of the fourth defendant without the consent and/or authorisation of the first defendant. The remainder of the allegation in this paragraph are denied and the plaintiff is put to the proof thereof.

3. Ad Paragraph 11

First Defendant denies that it paid the plaintiff for the security assessment. In the event that the Court hold that such payment was made, then it was not made with the authority of the first defendant.

4. Ad Paragraph 12

4.1 First Defendant denies the allegation in this paragraph. In amplification the first defendant pleads that in procuring good and services it is bound to act in terms of section 217 of the Constitution of the Republic of South Africa, Act 1996, the Public Finance Management Act 1 of 1999 (the PFMA), and its own policy on procurement of goods and services (the policy).

4.2 First Defendant denies that it procured the services on the basis of the verbal instruction of the third defendant. In the event that it is found that the services were procured then first defendant pleads that the procurement is illegal and unenforceable in that it is in violation of the PFMA, the Constitution and policy.

5. Ad Paragraph 13 – 13.2

First Defendant admit that plaintiff would with effect from January 2011 provide the first defendant with two body guards who could be deployed to guard the third and fourth defendants free of charge. The remainder of the allegations in these paragraphs are denied and the plaintiff is put to the proof thereof.

6. Ad Paragraph 13.3 – 13.5

The allegations in this paragraph are denied. The first defendant pleads further that if it is found that the third defendant concluded an agreement with the plaintiff for the provision of the static guarding services at the residences of the third and fourth defendants, then such an agreement is illegal and unenforceable in that is in violation of the Constitution, the PFMA and the policy.

7. Ad Paragraph 14.2 – 14.3

First Defendant denies the allegations in these paragraphs in particular the first defendant denies that the plaintiff paid the guarding subcontractor for the services rendered. In the event that the court finds that the plaintiff procured the guarding subcontractor as alleged in paragraph 14.3, then first defendant pleads that the said services was procured in violation of the Constitution, the PFMA and the policy and accordingly the first defendant is not obliged to pay.

8. Ad Paragraph 15

First Defendant denies that it paid a portion of the invoices referred to in paragraph 14.4. In the event that the court finds that the first defendant paid such invoices, then the invoices were paid in error in that they were paid pursuant to an illegal contract and accordingly the plaintiff is liable to refund the first defendant for the invoices so paid in error.

13. The crux of the objection to the proposed amendment by the respondent is that the applicant retracts admissions which were express or deemed. The respondent's case is based on an oral agreement allegedly entered into between the parties. However, the proposed amendment does not withdraw an admission on the pleadings but amplifies the applicant's defence by challenging the authority of the person who represented the applicant when the agreement was made.

14. In paragraph 4.5 of the plea the applicant denies that there are outstanding invoices arising out of the written agreement. In my

view, that is not a withdrawal of an admission. It is amplification of the defence that challenged the authority of the third defendant

to conclude an oral agreement. It is for the applicant to prove lack of authority on the part of the third defendant to conclude an oral agreement. Therefore, it is my considered view that the proposed amendment in this regard does not alter the position of the respondent.

15. Applicant admits having received the services and having paid some of the invoices. However, applicant amplifies that although it paid for certain invoices presented to it, the third respondent was not authorised by it to enter into an oral agreement with the respondent because it is contrary to the Constitution, the PFMA and procurement policy of the applicant to procure services and goods of such a high amount in that manner.

16. I am unable to agree with the respondent that the applicant is mala fide in bringing this application. The applicant has testified that it became apparent after consultation with counsel that certain information was required which was not furnished by the respondent.

When the respondent intimated that it does not have the documents requested, it galvanised the applicant to amend its plea.

17. I agree with the applicant that it was entitled to amend its plea even if it meant that the respondent will lose its case. I am satisfied that there is no prejudice to be suffered by the respondent which is incapable of being remedied by a costs order. I am mindful that the trial of the matter is set down for the 18th October 2017. Should the proposed amendment be effected within the time limits set by the rules followed by the consequential amendment

by the respondent of its particulars of claim, it is abundantly clear that the hearing of this matter may not proceed on the 18th October 2017.

18. It is my respectful view, that there was no mala fides on the part of the applicant in bringing this application and that the proposed

amendment does not in any way prejudice the respondent in the conduct of its case save for costs for a further postponement. I am therefore satisfied that the applicant's explanation in bringing the amendment is reasonable and the application must succeed.

19. In the circumstances, I make the following order:

I. The application for leave to amend the applicant's plea is granted.

II. The applicant to serve and file its amended pages within 10 days from the date of this order.

III. The applicant to pay the costs of this application.

M L TWALA J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

For the Applicant: Adv. JF Nalane

For the Respondent: Adv. G Singh

Date of hearing: 11 September 2017

Date of Judgment: 15 September 2017

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Prepared on 12 October 2026 · Esheria