

SOUTH AFRICA / JUDGMENT

Mojalefa v MFM Motors Spares (Pty) Ltd (2453/2019) [2020] ZANWHC 71 (22 October 2020) [2020] ZANWHC 71

COURT

North West High Court, Mafikeng

BEFORE

M.E. Mahlangu

CASE / FILE NUMBER

2453/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION - MAHIKENG

Case no: 2453/2019

In the matter between:

MAOBA WILLIE

MOJALEFA

PLAINTIFF

and

MFM MOTORS SPARES

(PTY) LTD

DEFENDANT

JUDGEMENT

MAHLANGU AJ

Introduction

- [1] The plaintiff instituted an action against the defendant claiming R4 000 000.00 based on present, future and past loss of income, undue enrichment and punitive damages. The defendant filed an exception to the plaintiff's particulars of claim, on the ground that the particulars of claim lacks the averments necessary to sustain a contractual or delictual claim as stated in the particulars of claim. The exception is opposed by the plaintiff.

- [2] The plaintiff in the action is the respondent in the exception and the defendant in the action is the excipient in the exception. The parties will hereunder be referred to as plaintiff and defendant respectively.

Factual background

- [3] The plaintiff was employed by the defendant from the year 2000 to 23 August 2018 as a messenger and sales man, when he was dismissed by the defendant.
- [4] During 2017, the plaintiff discovered that he was a director of the defendant. He approached the defendant and enquired about his directorship. He could not be furnished with the documentation to show when was he appointed as a director. The plaintiff approached the Department of Trade and Industry (DTI) where it was confirmed that he is indeed a director of the defendant. According to the information plaintiff received from DTI, he was a director of the defendant from 10 November 2003 to 28 February 2009.
- [5] The plaintiff was unaware that he was the director of the defendant as he never participated in any business activities of the defendant. The plaintiff was also never remunerated as a director of the defendant. When the plaintiff enquired from the defendant about the benefits of being a director, he was informed that his name was merely used for purposes of obtaining a BEE certificate so called fronting.
- [6] The defendant entered appearance to defend the action on 18 October
2019. On 29 October 2019, the defendant delivered a notice of exception. On 4 December 2019, the plaintiff delivered the notice in terms of Rule 28(1) to the defendant, notifying the defendant that it intends amending its particulars of claim by deleting paragraphs 4, 5, 6 and 7 of the particulars of claim and replacing them with the amended particulars of claim.
- [7] The defendant did not file an objection in terms of Rule 28(2) read with Rule 28(3).
- [8] On 25 February 2020, the plaintiff delivered a notice of bar because of the defendant's failure to file a plea. On 3 March 2020, the defendant delivered a notice in terms of Rule 23. On 10 March 2020, the plaintiff filed amended particulars of claim.
- [9] At the hearing of the exception, the following issues were raised by the defendant:
- 9.1 That the plaintiff's amended particulars of claimed were not filed within 10 days as per Rule 28(7) of the Uniform Rules of Court and that there is no condonation application for the late filling of the amendment.
- 9.2 That the plaintiff's claim lacks the averments necessary to sustain a cause of action on the claims against the defendant.

Amended particulars of claim

- [10] As mentioned above, the plaintiff delivered the amended particulars on 10 March 2020. The defendant submitted that it did not object to the plaintiff's intention to amend the particulars of claim and therefore plaintiff could have filed his amended particulars of claim within 10 days of effecting the notice to amend, which was on 7 January 2020.
- [11] The amendment is opposed by the defendant on the basis that it was not filed in terms of Rule 28(7) of the Uniform Rules of Court. Furthermore, that the amendment was not preceded by an application for condonation of the late filing of the amendment. The plaintiff only dealt with condonation in their heads of arguments. The defendant only dealt with the objection of the amended particulars of claim in its heads of arguments and during oral arguments in Court.
- [12] The plaintiff delivered the amended particulars of claim 10 days after the notice to amend without an application for condonation of its late filing. Rule 28(4) provides that:
- "If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend".*
- [13] The plaintiff argued that Rule 28(4) is only applicable where there was an objection to amend in terms of Rule 28(2). In this matter, the defendant did not object to the amendment.
- [14] I do not read in the rules a definite obligation that an applicant must or shall file or deliver the application to amend within 10 days. To the contrary, Rule 28(4) uses the word "may" and not "shall". There is in my view nothing that precludes an applicant to file such an application after a period of 10 days have lapsed.
- [15] In *Waja v Orr* 1931 TPD 149, the court indicated that an application for material amendment to the pleadings should be made before trial so that the pleadings would be settled by the time of the hearing. In *Moolman v Estate Moolman* 1927 CPD 27 (*Moolman*) it was held that an application for amendment can be made even after close of pleadings.
- [16] The defendant referred the Court to the matter of *Van Heerden v Van Heerden* 1977 (3) SA 455 (W) at 457A-458A, and submitted that an amendment of a pleading can only take place in terms of Rule 28(7), because the plaintiff's amended particulars of claim have lapsed. Rule 28(7) provides that:
- "Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form."*
- [17] In the matter of *Trans-Drakensburg Bank LTD v Combined Engineering* 1967(3)SA D it was held that if a litigant had delayed in bringing a formal application to amend, this in itself is no longer ground for refusing

the amendment until the respondent can show prejudice. In the current matter the defendant has not shown any prejudice. In any event the defendant has not as yet file a plea. There can therefore be no prejudice and in my view an application for condonation for late filing of the application to amend was not even necessary especially because the amendment was not even objected by the defendant.

[18] All the defendant says is that in accordance with the provisions of Rule 28 of the Uniform Rules of Court, the application ought to have been made by the plaintiff on or before 7 January 2020. The defendant has clearly misinterpreted the provision of Rule 28(4) as being peremptory.

[19] It is trite law that the granting or refusal of an application for amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in light of all the facts and circumstances before it.

[20] In Moolman *supra* it was held that:

“the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is made mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated with costs, or in other words unless the parties cannot put back the purpose of justice in the same position as they were when pleadings which is sought to amend is filed.”

[21] In the matter of Trans- African insurance Co Ltd v Maluleka 1956(2)SA 273 (A) at 279 C, Schriener JA said the following:

“There is no introduction of fresh cause of action but only a clarification of a step in the proceedings which is assumed has insufficiently or imperfectly set out the one cause of action that throughout has been relied upon.”

[22] In the amended particulars of claim, the plaintiff has introduced no fresh cause of action but has clarified what was already contained in the particulars of claims initially filed.

[23] The main reason why the defendant is opposing the application for leave to amend is set out in its heads of arguments in particular that the amended particulars of claim are excipiable in that it lack to disclose a cause of action.

[24] It is not suggested by the defendant that the plaintiff will be unable to produce evidence to support the amended particulars of claim. In my view, the proposed amendment seeks to ventilate the issues before court. There is no prejudice to the defendant who has in any case not yet pleaded. In my view, the plaintiff ‘s particulars of claim in the amended form clearly set out a cause of action.

Exception

[25] As mentioned above, on 1 November 2019, the defendant delivered a notice of intention to take exception to plaintiff’s

particulars of claim in terms of Rule 23(1). The general and overall complaint by the defendant was that, the plaintiff's three causes of action set out in his particulars of claim lacks averments necessary to sustain a cause of action.

[26] The defendant made submissions on both the particulars of claim and the amended particulars of claim even though he maintained that the amended particulars of claim are not before court, as they were delivered after 10 days as mentioned above.

[27] The defendant's complaint regarding plaintiff's individual claims are that they lack averments necessary to sustain a cause of action, I set them out below:

Complaint: Present, future and past loss of earnings

[28] The defendant submitted that the plaintiff did not allege in his particulars of claim that:

28.1 he was entitled to be employed as a director of the defendant;

28.2 he was entitled to be remunerated as a director of the defendant; and

28.3 the plaintiff did not plead that there was a contract entered into between the plaintiff and the defendant.

Complaint: Unjustified enrichment

[29] The defendant submitted that the plaintiff need to aver and prove that:

29.1 The defendant is enriched;

29.2 The plaintiff is impoverished;

29.3 The defendant's enrichment was at the expense of the plaintiff; and

29.4 The defendant's enrichment is justified.

Complaint: Fraud

[30] A representation was made by the defendant to the plaintiff;

30.1 A representation was false and was made with the intention that the plaintiff would react thereon;

30.2 The plaintiff was induced by the representation to act;

30.3 The plaintiff suffered damages as a result of acting on the false representation, setting out the measure of damages; and

30.4 When relying on a fraudulent non-disclosure, set out facts giving rise to a duty to disclose, that was deliberately breached in order to deceive.

Issues

- [31] From consideration of the particulars of claim and the exception, the crisp issue for determination is whether the averments made by plaintiff sustain a cause of action. If the question is negatively answered, it should be determined whether the plaintiff's amended particulars of claim have been formulated with necessary clarity to enable the defendant to know the cause of action.
- [32] To consider the main issue in this matter, being the present, future and past loss of earnings, the defendant submitted that, nowhere in the particulars of claim does the plaintiff allege that he was entitled to be employed as a director; that he was entitled to be remunerated as a director; and that he entered into a contractual agreement with the defendant for him to claim a contractual claim. The defendant can fairly plead whether plaintiff has or is still suffering loss of earnings after he was appointed as a director without his knowledge and was not remunerated accordingly. On this consideration, I do not see how plaintiff's averments did not disclose a cause of action.
- [33] The plaintiff submitted that he was employed as a messenger then promoted to be a salesman. He was never informed by the defendant that he was a director. He only found out on enquiring from DTI. Thus, he pleaded in paragraph 6.1 of the amended particulars of claim that, at all material times, the plaintiff was appointed as a director of the defendant and was therefore entitled to receive remuneration of his directorship. The defendant may simply plead and deny that plaintiff was ever appointed as its director and plaintiff would have to prove its case. In this regard too also, I do not see how plaintiff's averments that he was appointed as director does not disclose a cause of action.
- [34] In respect of the unjustified enrichment claim, the defendant submitted that the plaintiff needs to aver and proof that the defendant was enriched and the defendant was impoverished. Furthermore, that the defendant's enrichment was at the expense of the plaintiff and that the defendant's enrichment is justified. The defendant submitted that in terms of paragraph 6.3 of the amended particulars of claim the plaintiff was enriched at the time when the defendant was a director of its company. The defendant benefited by being compliant with the BEE requirement status which made it possible for the defendant to acquire potential clients. The defendant submitted that plaintiff was enriched at the expense of the plaintiff's name whereas plaintiff was impoverished. The defendant needs to plead and deny any enrichment as a result of plaintiff being its director. The plaintiff would then have to prove that indeed he was impoverished whilst the defendant was enriched during the period in which he was a director without his knowledge. On these considerations too, I do not see how the plaintiff's averment does not disclose the cause of action.
- [35] In respect of the fraud claim, the defendant submitted that, for the plaintiff to successfully sue on the claim of fraud, the plaintiff must show and prove misrepresentation and that the plaintiff suffered damages as a result of misrepresentation. The plaintiff referred to paragraph 6.2 of the amended particulars of claim and submitted, that the defendant's

conduct of not informing the plaintiff that he was a director of the defendant and deliberately made him to continue as a salesman, is misrepresentation. On these considerations also, the defendant can clearly plead to the fraud claim and let the plaintiff prove it. I do not see how plaintiff's averment on fraud does not disclose a cause of action.

ORDER

In the result, the following order is made:-

1. The amendment of the particulars of claim as set out in the notice to amend, is granted;
2. The defendant's exception that the plaintiff's particulars of claim lack averments necessary to sustain a cause of action, is dismissed.
3. The defendant is ordered to pay the costs of the exception.

M.E. MAHLANGU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING : 18 SEPTEMBER 2020

DATE OF JUDGMENT : 22 OCTOBER 2020

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