

SOUTH AFRICA / JUDGMENT

Ntanzi and Another v Draht (12726/2013) [2018] ZAGPPHC 363 (18 May 2018)

[2018] ZAGPPHC 363

COURT

North Gauteng High Court, Pretoria

BEFORE

Nochumsohn

CASE / FILE NUMBER

12726/2013

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA ·

(1)

NOT

REPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES

CASE NO.

12726/2013

18/5/2018

In

the matter between:

LOYISO
NTANZI
First Applicant
NOMUHLE
NTANZI
Second Applicant
and
HEIKO
DRAHT
Respondent

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an application in terms of Rule 28(4) for leave to be granted to the Applicants to amend their Plea and Counterclaim in accordance with the Fifth Notice of Intention to Amend (incorrectly titled "Defendants' Third Notice of Intention to Amend"), delivered on 7 September 2017.
2. The Applicants in this application are the Defendants in the main action.
3. The Respondent (who is the Plaintiff in the main action), opposed the application and delivered a Notice of Intention to Oppose the Notice of Intention to Amend on 12 September 2017.
4. The Applicants' attorney deposed to the Founding Affidavit in this application. The nub of such Affidavit is that the Applicants have delivered five Notices of Intention to Amend, and, in each instance, the Respondent has delivered Notices of Intention to Oppose the Applicants' intended amendments. On each occasion the Applicants have attempted to accommodate the Respondent's objections by serving fresh Notices of Intention to Amend, thinking that such Notices had addressed the intended objections to the preceding Notices. The Applicants state that the intended amendment, if granted, would change the status quo for the Respondent in the pending trial, which is the reason why the Respondent has attempted to thwart each one of the intended amendments.
5. The Applicants aver further that in this lengthy process of attempting to amend their Plea and Counterclaim, in the face of the resistance to such amendment on the part of the Respondent, and knowing that the Applicants are desirous of amending, the Respondent has deliberately enrolled the trial for hearing for 23 October 2018. The Applicants aver that this conduct is indicative of a lack of bona fides on the part of the Respondent.
6. The cause of action in the main claim is ex contractu, and arises out of a building contract entered into between the parties, attached to the Particulars of Claim as annexure "A".
7. The intended amendment sought in the Applicants' Fifth Notice of Intention to Amend does not serve to bring about any withdrawal of admissions. The main thrust of the amendment, is to seek rectification of the clause in the Building Contract which governs

the contract price, which is expressed in such Contract to be the amount of R2 622 500.00 (two million six hundred and twenty two thousand five hundred Rand).

8. The intended amendment serves to convey that the Contract did not reflect the true common intention of the parties insofar as it relates to the stipulated contract price, as the true price to be paid would be the actual expenses expended by the Respondent in respect of the construction, plus the sum of R150 000.00 in respect of the Project Management fee. The intended amendment also serves to convey that the stipulated price of R2 622 500.00 was based on an estimation of the construction cost, the recordal of which was required by the Applicants to enable them to obtain a loan from Nedbank Limited. The intended amendment to the Counterclaim serves to introduce a rectification to the Contract, embracing the foregoing, coupled with allegations to the effect that there was a mistake in the drafting of the contract insofar as it relates to the Plaintiff's entitlement to payment, which mistake was a result of either a bona fide error between the parties, or, an intentional act of the Plaintiff.
9. In the Respondent's Notice of Objection to the intended amendment, the Respondent avers that the Applicants attempt to seek rectification of an Agreement admitted by them. This is not so, as in the initial paragraph 4 of the Defendant's Plea, as it currently stands, which is in answer to paragraph 5 of the Particulars of Claim, (the paragraph in which the Plaintiff alleges that the parties entered into annexure "A"), the Defendant admitted the averments, but pleaded that the parties had committed to certain pre-contractual arrangements and/or undertakings. In the intended amendment to this paragraph, the Applicants admit that they entered into annexure "A", but go on to aver that same did not reflect the true common intention of the parties. This does not give rise to a withdrawal of an admission.
10. In order to establish rectification, one must prove that there was a mistake in drafting the Agreement (*Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T) 674), and that such mistake was either a bona fide mutual error (*Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 SCA at
- 32) or an intentional act of the other party (*Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) All SA 371 (1) TJ).
11. The Respondent avers that paragraph 7 of the Counterclaim, in accordance with the intended amendment, if granted, will allege a mistake in the drafting of the Contract, as a result of bona fide error between the parties or, an intentional act of the Plaintiff. To this end, the Respondent avers that this does not make sense, as the word "mistake", "bona fide error between the parties" and "an intentional act of the Plaintiff", are stated but it is not clear from the intended amendment what mistake was made in the recording of the Agreement and why the mistake was made. These submissions are not cogent, as the detail of the mistake, as well as the reasons for the mistake, are all matters for evidence, which need not be pleaded.
12. The Respondent objects further to the intended amendment on the basis that paragraphs 4.4 of the amended Plea and 4.2 of the amended

Counterclaim, if the amendment is granted, would read:

"The recording of the contract price of R2 622 500.00 was based on an estimation of what the construction of the house and outbuilding would cost, the recordal of which was required by the Defendants to enable them to obtain a loan from Nedbank Ltd."

from which, the Respondent argued that it is clear that there was no mistake in the recording of the contract price. The Respondent says that the contract price was stipulated in order for the Defendants to obtain a loan from Nedbank and there was no error. The Respondent thus avers that by permitting the amendment it would render the Plea and Counterclaim excipiable.

13. It is clear from the Notice of Intention to Amend that on the Applicants' version the true price payable to the Respondent was something other than what was stipulated in the Contract. If this is so, then the Contract, as it stands, would not bear out the

continuing common intention of the parties, with the result that the Applicants ought to be permitted to plead the rectification and be given an opportunity to prove same at the trial.

14. It is not necessary for me to determine in this Application whether or not a mistake was made. This is something which will be determined by the trial court, upon hearing all of the evidence from all of the parties.

15. In the circumstances, I am inclined to grant the Applicants leave to amend.

16. Accordingly, I make the following Order:

16.1. The Applicants are afforded leave to amend the Plea and Counterclaim within ten days from the date of this Order, in accordance with the Fifth Notice of Intention to Amend dated 5 August 2017 and filed on 7 September 2017;

16.2. The Respondent is ordered to pay the Applicants' costs in relation to this application, to be taxed on the scale as between party and party.

NOCHUMSOHN,G

ACTING JUDGE OF THE HIGH COURT

On behalf of Plaintiff:

Advocate I Oschman

Instructed by:

Marais Parsons

On behalf of the

Second Defendant:

Advocate D Robertson

Instructed by:

Hieko Draht Attorneys

Date of Hearing:

17 May 2018

Date of

Judgment:

18 May 2018

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2018/363.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ntanzi-and-another-v-draht-unknown-topic-agpphc-2018>

Prepared on 10 October 2026 · Esheria