

SOUTH AFRICA / JUDGMENT

Peri Formwork Scaffolding Engineering (Pty) Ltd v Epsilon Developments (Pty) Ltd (2127/2019) [2021] ZAGPJHC 833 (14 December 2021) [2021] ZAGPJHC 833

COURT

South Gauteng High Court, Johannesburg

BEFORE

S M Katzew

CASE / FILE NUMBER

2127/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2127/2019

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

14/12/21

In

the matter between:

PERI

FORMWORK SCAFFOLDING

ENGINEERING

(PTY) LTD

(Registration

Number: 2009/005054/07)
Plaintiff
and
EPSILON
DEVELOPMENTS (PTY) LTD
(Registration
Number: 2016/12713207)
Defendant

JUDGMENT

KATZEW, AJ:

[1] In this matter the Plaintiff as Excipient has taken exception to the counterclaim of the Defendant as Respondent. For the sake of convenience, the Court will refer to the parties as in convention.

[2] A good preview to a consideration of an exception is an analysis of the pleading to which exception is taken independent of the grounds of exception. The counterclaim is set out hereunder as follows:

“4.1 On or about the 27 June 2016 and at Midrand, the Defendant ... applied for a credit facility with the Plaintiff by completing a written Credit Application And Standard Terms And Conditions Of Sale And Lease Of Goods ..., constituting an offer to conclude an agreement with the Plaintiff; and

4.2 On or about the 1st day of July 2016 and at Midrand the Plaintiff ... accepted the offer in writing ... thus concluding a ... written

agreement between the parties ... annexed ... as Annexure “PE1”. ...

5 Subsequent to the conclusion of the agreement the Defendant hired certain scaffolding and formwork described as “Multiflex Prop Support System (“the equipment”) from the Plaintiff which the Defendant utilized on a construction site described as “Site 1118” and/or “House Halamandaris”.

6 The equipment was damaged beyond repair on 5 November 2016 when a concrete slab collapsed thereon.

7 The equipment was inspected by the Plaintiff’s authorised representative Deon van Der Merwe on 7 November 2016, and written off. The Plaintiff subsequently arranged for the return to it of the equipment.

8 Notwithstanding the return of the equipment to the Plaintiff, the Plaintiff continued debiting the Defendant’s statement with monthly rentals and charges in respect thereof, in the monthly amount of R14 897.68, for 27 months until February 2019, such rentals amounting to the sum of R402 237.36.

9 In addition, the Plaintiff debited the Defendant's statement with charges and/or rentals incurred by "Gaum Civils", whose full and further particulars are to the Defendant unknown, in respect of a project described by the Plaintiff as "Ace Auto Scrapyard", in the sum of R223 433.50 under circumstances where the Defendant:-

9.1 Was not employed on any project relating to "Ace Auto Scrapyard"; and

9.2 Did not rent any equipment from the Plaintiff in relation to any project named "Ace Auto Scrapyard";

9.3 Did not employ and/or authorise any entity "Gaum Civils" to rent equipment from the Plaintiff on the Defendant's account.

10 The Plaintiff was not liable for the payment of the amounts referred to in paragraphs 7 and 9 as aforementioned, in the sum of R625 670.86.

11 The Defendant nevertheless paid the amounts referred to in paragraphs 7 and 9 as aforementioned in the bona fide and reasonable belief that such amounts were due, owing and payable to the Plaintiff.

12 The sum of R625 670.86 was not owing to the Plaintiff.

13 The Plaintiff nevertheless appropriated the aforesaid amount paid to it by the Defendant."

[3] The counterclaim contains all the elements of the *causa condictio indebiti* in both of its component claims for R402 237,36 and R223 433,50, the former for monthly rental payments made in error for twenty-seven months after the rented equipment had been returned to the Plaintiff, and the latter for rental payments made in error by the Defendant for a third party who is unknown to the Defendant on a project whereto the Defendant has no link.

[4] An additional *causa* covering both component claims of the counterclaim is that in defiance of a tacit term of the Agreement between the parties for the Defendant to only be liable for rental of scaffolding equipment for periods when the Defendant was in actual possession of the rented scaffolding equipment, the Plaintiff debited the Defendant's account with rentals for periods when the Defendant was not in possession of the rented equipment, and the Defendant paid the rentals in error.

[5] All the causes of complaint that ground the exception distil to insufficient particularity to enable the Plaintiff to identify the source transactions and rented scaffolding for which the Defendant was wrongly debited with rental and which the Defendant paid in error.

[6] Different considerations apply to the exceptions to the two claims comprising the counterclaim. It is accordingly convenient to deal with them separately.

THE FIRST CLAIM: - FOR RECOVERY OF PAYMENTS OF RENTAL FOR EQUIPMENT FOR TWENTY-SEVEN MONTHS AFTER THE EQUIPMENT WAS DAMAGED BEYOND REPAIR AND RETURNED TO THE PLAINTIFF

- [7] Although a consideration of the exception to the counterclaim requires that the counterclaim be viewed in isolation from even the Particulars Of Claim to which it is appended, logic dictates that resort may be had to the Particulars Of Claim and the plea thereto to properly contextualize the counterclaim and the exception.
- [8] There are ample references in the Particulars Of Claim and in the plea that indicate that the claims for refunds in the counterclaim for rentals paid for equipment for periods when the Defendant was not in possession of such equipment are part of a series of transactions on a running account that the Defendant had with the Plaintiff extending at the very least over the period from November 2016 to February 2019.
- [9] Indeed, it is legitimate to infer from this context that the original transaction underpinning the Defendant's first claim for a refund of rentals paid by it to the Plaintiff for Multiflex Pro Support System after its damage beyond repair and return to the Plaintiff is but one of at least a few transactions for the rental of the same or similar equipment by the Plaintiff to the

Defendant on a running account at inter alia the same construction site, and probably considerably more than just a few such transactions.

- [10] To distinguish the transaction underpinning the first claim for a refund in the counterclaim from other similar transactions, it is necessary for the Defendant to supply precise particularity of the original transaction underpinning this claim, together with an accurate description and exact quantities of the equipment that was damaged beyond repair and returned to the Plaintiff. It is also necessary for the Defendant to include precise particulars of the rental payments it made in error for 27 months after the equipment was returned to the Plaintiff (due in no small measure to the imprecise formulation of this part of the counterclaim, the Court is at a loss as to whether the 5 groupings of monthly claims for September 2018, October 2018, November 2018, December 2018 and January 2019 on annexure "PE2" to the Particulars Of Claim for House Halamandaris and House Saki 1118, which resemble the monthly overpayment averred in paragraph 8 of the counterclaim, form part of the counterclaim).
- [11] There are no other sources for the extraction of such precise particularity in the pleadings preceding the counterclaim. It is impossible to find any reconciliation between the first claim of the counterclaim and paragraph 6 of the Particulars of Claim, which includes claims by the Plaintiff for what appear to be payment of rentals on the same construction site as the claim for a refund in the first claim in the counterclaim for seven months of the twenty-seven months of the claim in the counterclaim. There is also no apparent common ground between the total claims of R293 864.38 for House Saki 1118 and House Halamandaris on annexure "PE2" to the Particulars Of Claim and this first claim in the counterclaim for R402 237.36 linked to the same construction site.

- [12] It is not even clear to the Court whether any portion of the counterclaim of R402 237.36 is for reversal of amounts comprising the R293 864.38 of the Plaintiff's claim for rentals of equipment on the same construction site as per annexure "PE2", which the Court at first blight was of the view might be the case by virtue of the 7 months overlap between the Plaintiff's claims as per annexure "PE2" and the Defendant's counterclaim for overpayments of rental for equipment on the same construction site.
- [13] It may well be that the manner of formulation of the Plaintiff's claim has contributed to the vagueness associated with the Defendant's running account with the Plaintiff. But the focus of this exercise remains an examination of the counterclaim. As already stated, it is only permissible to have resort to the Particulars Of Claim to contextualize the counterclaim. This is certainly not the time for shifting of any blame for inadequacies in the joinder of issues on the pleadings from the counterclaim to the Particulars Of Claim.
- [14] Although not incorporated into the counterclaim, in paragraph 5.2.4 of the plea the Defendant sought to rely on clause 12.8.3 of the Agreement between the parties to impose on the Plaintiff the obligation of recording the particulars of the rental equipment damaged beyond repair and returned to the Plaintiff. Quite apart from the non-incorporation hereof into the counterclaim, a proper interpretation of this clause reveals that it is for the benefit of the Plaintiff and cannot be regarded as a mechanism to relieve the Defendant of any burden of proof that would normally be associated with the Defendant's first claim in the counterclaim.
- [15] In short, there is a total absence of joinder of issue between the parties on the pleadings on the status of the Defendant's account with regard to scaffolding supplied by the Plaintiff to the Defendant for utilization on the construction site described as "Site 1118" and/or "House Halamanadaris". Certainly, on the counterclaim at least where the Defendant is dominus litis, the Defendant must bear responsibility for supplying sufficient particularity to identify the transaction or transactions impacted by the damage beyond repair to the equipment returned to the Plaintiff but nevertheless charged for and paid in error by the Defendant.
- [16] This the Defendant has failed to do in the counterclaim, and until it does so, the Court accepts that the Plaintiff is unable to meaningfully join issue with this part of the counterclaim with the degree of accuracy ascribable to the concept of joinder of issue.
- [17] The exception to this part of the counterclaim will therefore be upheld, with leave to the Defendant to give notice of intention of a suitable amendment to overcome the grounds of the exception.

THE SECOND CLAIM: - FOR RECOVERY OF RENTAL FOR EQUIPMENT ON A PROJECT TO WHICH THE DEFENDANT HAS NO LINK

- [18] Contrary to the complaints by the Plaintiff directed towards this part of the counterclaim, no difficulty should be posed to the Plaintiff to identify the exact nature, source and detail of the Defendant's counterclaim of R223 433.50 for recovery of rental paid for hire of equipment on a project named "Ace Auto Scrapyard" at the instance of a party described as Gaum Civils, which the Defendant contends is unknown to it.
- [19] The total of the amounts alleged as owing on annexure "PE2" to the Particulars Of Claim for the item Ace Auto Scrapyard is exactly R233 433.50, which corresponds to this part of the Defendant's counterclaim. The Plaintiff must have access to records supporting the inclusion of the amounts for this item on its statement to the Defendant comprising annexure "PE2" to the Particulars Of Claim. Indeed, if it is not possessed of such records, it does not behove it to cry foul on the counterclaim.
- [20] The source documents presumably in the Plaintiff's possession supporting the inclusion of the amounts for this item on the statement are an adequate resource base from which to either debunk the Defendant's contention that the amounts appearing against the items for Ace Auto Scrapyard on annexure "PE2" to the Particulars Of Claim are not for the Defendant's account, or for the Plaintiff to acknowledge its error, and submit to the truth of the contention.
- [21] The exception to this part of the counterclaim will therefore be dismissed.

COSTS

- [22] Costs normally follow the result. Where only partial success is achieved in legal proceedings, the Court in the exercise of its discretion should endeavour to measure the degree of success achieved by the Plaintiff in order to apportion costs fairly.
- [23] The Court is of the view that the parties expended an equal amount of time on the exception to each of the claims comprising the counterclaim.
- [24] In the exercise of its discretion on costs, the Court therefore inclines to the view that fifty percent is an adequate measure of the success achieved by the Plaintiff in this matter.
- [25] A fortiori, the Plaintiff is entitled to 50% of its costs.

THE FOLLOWING IS ORDERED:

1. The exception to the Defendant's counterclaim for R402 237.36 is upheld.
2. The Defendant is granted leave to deliver a notice of intention to amend its counterclaim within fifteen days of receipt of this order.
3. If the Defendant omits to deliver a notice of intention to amend its counterclaim within 15 days of receipt of this order, the causa of the Defendant's claim for R402 237.36, together with the claim, are forthwith to be regarded as struck.
4. The exception to the Defendant's counterclaim for payment of R233 433.50 is dismissed.

5. The Defendant is to pay 50% of the Plaintiff's costs.

S M KATZEW

Acting Judge of the High Court of South Africa

DATE OF JUDGMENT: 14th December 2021

DATE OF HEARING: 22nd April 2021

APPEARANCES:

For Excipient: Adv. Johan Meiring Prinsloo

Instructed by: Innes Steenkamp Attorneys

Tel. 011/486-4888

For Respondent: Adv. Gerhard Botha

Instructed by: Coetzee Duvenhage Inc

Tel: 011/472-8681

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