

SOUTH AFRICA / JUDGMENT

Vhazwimi Properties (Pty) Limited v Bise Engineering Projects CC (11/22832) [2019] ZAGPJHC 217 (16 May 2019)

[2019] ZAGPJHC 217

COURT

South Gauteng High Court, Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

11/22832

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NO.: 11/22832

In

the matter between:

VHAZWIMI
PROPERTIES (Pty)
Limited Applicant
and
BISE
ENGINEERING PROJECTS
CC Respondent

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an interlocutory application in terms of which the applicant, Vhazwimi Properties (Pty) Ltd seeks leave to amend its plea in the action instituted by the respondent Bise Engineering Project CC. The parties in this judgment are referred to as cited in the main action.

- [2] The plaintiff objected to the intention to amend the plea by the defendant. It was following the objection that the defendant filed this application.
- [3] The plaintiff's case in the main claim as set out in the particulars of claim is based on the alleged failure by the defendant to pay for the material supplied and services rendered in terms of the oral agreement concluded between the parties.
- [4] The plaintiff contended in the particulars of claim that, in terms of the agreement it manufactured and installed the material at the instance of the defendant during the period January to September 2009. The plaintiff accordingly claims the sum of R924 677.18 as payment for the services rendered and the material supplied to the defendant.
- [5] The defendant in its plea does not dispute the oral agreement with the plaintiff but contended that it was concluded with the joint venture trading then as HOHUP UBUNYE Construction (Pty) Ltd (HHU).
- [6] In the alternative, the defendant avers that, if it was to be found that the oral agreement was with it and not the joint venture, the claim has prescribed.
- [7] In the further alternative the defendant avers that, should it be found that the agreement was between the two parties as cited in the particulars of claim then, the plaintiff failed to comply with the terms of the agreement in that the material supplied was of inferior quality and did not comply with the relevant standards of the industry. It was also averred that the plaintiff did not perform the services timeously and thus did not qualify for the payment claimed.

History of the litigation

- [8] The combined summons was served and filed during June 2011, and after that, the defendant served and filed its plea on 29 April 2013.
- [9] On 13 September 2018, the applicant served and filed its notice of intention to amend its plea in terms of rule 28 of the Uniform Rules of the High Court (the Rules). The plaintiff filed its objection to the defendant's notice of intention to amend on 26 September 2018.
- [10] It appears the matter was initially set down for trial on 13 October 2017 but was on that date postponed sine die by agreement between the parties. The matter has now been re-enrolled for the trial to commence on 7 November 2019.

The reason for the amendment

- [11] The essence of the defendant's contention is that it is entitled to leave to amend its plea because it has at all material times been acting as a joint venture with HHU and thus the plaintiff had instituted proceedings against the wrong party. The proceedings ought to have been against the joint venture.

[12] The reason for the proposed amendment is set out in paragraphs 8 and 9 of the founding affidavit in the following terms:

"7 The defendant has at all material times operated as a joint venture partnership . . .

8 It has always been the defendant's case that the plaintiff has instituted proceedings against the wrong party and that the plaintiff

should have issued the summons against the joint venture partnership. . .

9 All that the amendment seeks to do is to elaborate this defence by including a plea of non-joinder of HHU. This follows from what has already been pleaded by the defendant."

[13] In the proposed amendment the defendant seeks to do the following:

"2.4.1 . . . to correct the name of the joint venture to be HO HUP UBUNYE/Vhazwemi Properties JV, alternatively trading as Vhazwemi JV. Alternatively, a joint venture between the defendant and HO HUB UBUNYE Construction (Pty) Ltd established on the terms as set out in annexure "A" there to the joint venture agreement;

2.4.2 to include a new paragraph 3.2 which elaborates on the joint venture and the percentages in which the profits and losses of the joint venture would be shared and the split in liability for any contract;

2.4.3 to add a new paragraph 4.1.6, stating that "the plaintiff failed to manufacture, supply, deliver and install all the steel material and structures timeously or at all."

The plaintiff's objection

[14] The essence of the plaintiff's objection to the amendment is that its cause of action is based on the verbal agreement between itself and the defendant and not on the joint venture and that it has no knowledge of the joint venture. It further contended that, in terms of the contract, it dealt with the defendant concerning invoicing and payment which was effected from the defendant's bank account. It also averred that the cause of action is based on the contract with the defendant and not the joint venture.

Legal principles

[15] It is trite that in considering whether to grant or refuse leave to amend the court has the discretion to exercise, which it does by having regard to certain basic principles.[1]

[16] The relevant provisions governing an application to amend pleadings is rule 28 of the Rules which provides that:

"(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all parties of his intention to amend and shall furnish particulars of the amendment

- (2) The notice referred to in sub-rule (1) shall state that unless a written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with sub-rule (3) is delivered within the period referred to in sub-rule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend."

[17] The general approach when dealing with the issue of an application to amend pleadings is that the application will as a general rule be granted. An application will be refused if, it is made in bad faith or it would cause an injustice to the other party.[2]

[18] In the case of an injustice, an amendment will only be granted where the injustice to the other party can be compensated by a cost order. In Moolman,[3] the court held that the cause of an injustice to the other side in an amendment application could not be compensated by costs order if –

"The parties cannot be put back for the purposes of justice in the same position as they were when the pleadings, it is sought to be amended was filed." [4]

[19] The primary consideration in granting or refusing an application to an amendment is to ensure that justice is done between the parties to the dispute. The underlying consideration of doing justice between the parties is to ensure that the dispute is properly ventilated by determining the real issues between the parties. [5]

[20] It is trite that an amendment is not available as a matter of right and as stated in Krogman v Van Reenen,[6] the applicant has:

". . . to show reasonable grounds, he must show, for instance that the matter involved in the amendment is of sufficient importance to justify him putting the court and the other party to the manifold inconvenience of postponement and that the necessity for an amendment has (arisen) through some reasonable cause, even if it be only bona fide mistakes, which would, I take it to be minimum reasonable cause admissible in this connection."

[21] As appeared earlier in this judgment the need to amend the pleading according to the defendant arose because it wishes to elaborate on its defence. In this respect, it appears the main reason for the amendment is to include in the plea the joint venture agreement which is attached to the respondent's papers. The issue is accordingly whether there is a joint venture agreement between the defendant and HHU. The other related question, is whether the joint venture is a legal entity with the capacity to sue or be sued. The answer to this question is found in paragraph 3.3 of the very joint venture agreement, which provides as follows:

"In no event shall the Parties consider the Joint Venture to be, or in any way act as though it were, a corporation, partnership or any other form of an entity having any independent legal personality whatsoever." (My emphasis)

[22] It is clear that the agreement expressly disavowed a partnership between the parties. In giving effect to the provisions of the agreement between the parties, it means they (the parties) explicitly excluded the joint venture from existing as a partnership, thus denying its (the joint venture) existence as a legal personality, capable of being sued or suing in its own name.

[23] The facts in this matter are similar to those in *Electro-Motive Sibanye Joint Venture v Transnet Ltd* [7], where it was contended by one of the parties that they had intended to create a joint venture partnership despite the provision to the contrary in the agreement. The court in dealing with this issue, correctly, held that:

"[3] The question is whether the joint venture agreement constituted a partnership between STS and EMD-SA. The joint venture agreement is not vague or indefinite in its terms. It stipulates that there is no partnership between them and that the joint venture shall have no separate legal personality. Contracting parties are, as a rule, bound by their agreements. If the agreement states that there is no partnership, a party to the agreement cannot claim that there is one in fact. See *Hart v Pickles* 1909 TH 244 at p 247; *Le Voy v Birch's Executors* 1913 AD 102. Third persons, on the other hand, are not necessarily bound by the description which contracting parties give to their agreement. At their instance, a court will declare the transaction a partnership if it is one in fact. See: *Joubert v Tarry & Co* 1915 TPD 277; cf *Zandberg v Van Zyl* 1910 AD 302, at p 309; *Pezutto v Dreyer & Others* [1992] ZASCA 46; 1992 (3) SA 379 (A)."

[24] The joint venture in the present matter, similar to *Electro-Motive*, [8] expressly stipulated that there was no partnership between the parties and that the joint venture did not constitute an independent

legal personality whatsoever. The parties are thus bound by the terms of their agreement. In light of this, it follows that the claim of the defendant that there is a binding partnership is unsustainable. The parties are bound by the express provision of the agreement, which means the joint venture between HHU and the defendant did not create a legal personality capable of suing or being sued.

[25] It is quite clear from the above analysis that the amendment which the defendant seeks to introduce would, if granted, make the pleadings excipiable. The plaintiff would accordingly be prejudiced by such an approach.

[26] In light of the above discussion, I am not persuaded that the defendant has made out a case that it would serve justice to grant leave to amend its plea. Accordingly, the application stands to fail.

Order

[27] In the premises, the defendant's application for leave to amend its plea is dismissed with costs.

E MOLAHLEHI

JUDGE OF THE HIGH COURT; JOHANNESBURG

Representation: For the Applicant: Adv. GB Bloch

Instructed by: Fluxmans Inc.

For the Respondent: Adv. S van Aswegen

Instructed by: Smit & Grove Attorneys

Date of hearing: 03 April 2019

Date of judgment: 16 May 2019

- [1] Caxtron Ltd and Others v Reeve Foreman (Pty) Ltd and Another [1990] ZASCA 47; 1990. (3) SA 547 (A) at 565G.
- [2] See Moolman and Estate Moolman 1927 A.D. 27 at 29.
- [3] Ibid. Page 29.
- [4] [See also Randa v Radopile CC 2012 SA (6) SA 128 (GST),
- [5] Barclays Bank International v African Diamond Exporters (Pty) Ltd 1976 (1) SA 1.
- [6] 1926 OPD 1921 at 194 to 195.
- [7] (2009/3994) [2009] ZAGPJHC 11
- [8] Ibid page 29.

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