



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO. 909/2019

Reportable	Yes
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In the matter between:

ORANGE FLAMINGO (PTY) LTD

Plaintiff / Respondent

and

MEMBER OF THE EXECUTIVE COUNCIL

RESPONSIBLE FOR PUBLIC WORKS

IN THE EASTERN CAPE

1st Defendant / Applicant

MEMBER OF THE EXECUTIVE COUNCIL

RESPONSIBLE FOR EDUCATION

IN THE EASTERN CAPE

2nd Defendant

APPLICATION TO INTRODUCE A COUNTER CLAIM

JUDGMENT

ZILWA J

[1] In this matter the applicant (first defendant in the action) seeks an order for, in the main,

- (i) Condonation of its failure to file its counterclaim timeously in the action;
- (ii) Leave in terms of Rule 24(1) of the Uniform Rules of Court (the Rules) to file a counterclaim to the respondent's action (as plaintiff in the action).

[2] The background to the application is as follows:

2.1 On 9 December 2019 the respondent instituted action proceedings against the applicant (as first defendant in the action) and the Eastern Cape MEC for Education as second defendant. The claim was for payment of monies which the respondent claimed to be owed by the defendants in the action in terms of a contract concluded between the parties on 17 December 2013, whereby the respondent was appointed by the defendants as Architects and Principal Agent on their behalf in the construction of a school known as Laerskool Grens.

2.2 In its plea in the action, which was amended 3 times, the applicant denies owing the respondent any monies in relation to the project. To the contrary, it contends that in fact the respondent has been overpaid by the applicant and it is the one that owes the applicant money in respect of such overpayment.

- 2.3 After all the pleadings, with the necessary amendments, had been finally closed and all pre-trial procedures had been finalised the parties sought and obtained case flow management orders that declared the matter as trial ready.
- 2.4 Upon being allocated the latest trial date and prior to the commencement of the trial, the parties signed the case flow management Form 2 dated 2 August 2022 where the applicant indicated that it would raise, as a point in *limine* at the trial, the issue of this Court's jurisdiction to hear the matter. No indication was given that the applicant was desirous of filing a counterclaim in the action until 12 August 2022 when a letter was addressed by the applicant's attorneys to the respondent's attorneys, requesting the respondent's attorneys' permission / agreement to file a counterclaim to the respondent's action. The alleged basis for the request was that "*on our consultation today the 12th August in preparation for the trial of the 17 August 2022 we discovered that we have a counterclaim against your client, (Orange Flamingo).*" The civil trial action had by then already been set down to proceed for three days commencing on 17 August 2022. The parties had estimated the duration of the trial to be three days.
- 2.5 On the same date of the receipt of the applicant's attorney's letter referred to above the respondent's attorneys responded, declining the consent sought from them for the filing of the counterclaim at that late stage, opining that this was an attempt to further delay the trial and to engineer a postponement thereof. They also pointed out that the applicant's

attorneys had confirmed, only a week before, that the matter was trial-ready and nothing had been said about the filing of the counterclaim.

- 2.6 After such refusal by the respondent's camp to the filing of the proposed counterclaim no further action was taken by the applicant in pursuit of the envisaged counterclaim.
- 2.7 On the scheduled date of 17 August 2022 the trial in the action commenced. Mr Jikwana, who appeared as Counsel for the applicant, addressed the Court first, challenging the Court's jurisdiction to proceed with the action.
- 2.8 The challenge was rebuffed by the respondents' Counsel, Mr Mapoma SC, who appeared with Mr Mpiti. After hearing argument from both sides I dismissed the applicant's challenge to the Court's jurisdiction, finding that on the facts and the law this Court does have jurisdiction to proceed with the hearing of the action.
- 2.9 After such ruling the respondent's Counsel made the plaintiff's opening address. Thereafter he called the plaintiff's sole witness to testify in support of its claim. The witness testified for two days, finishing his evidence in chief at about 15h15 on 18 August 2022.
- 2.10 The parties and the Court were agreeable that because of the lateness of the hour the witness's cross-examination could not commence on that day and it would have to stand down for another day.

- 2.11 At that point the applicant's Counsel verbally applied to the Court from the bar for the applicant to be allowed to file a counterclaim to the respondent's claim. He purported to make that verbal application in terms of Rule 24(1) of the Rules. The verbal application was vehemently opposed by the respondent's legal team, pointing out that, in the first place such application could not just be made verbally from the bar by applicant's Counsel and that it needed to be a substantive application in writing by way of a Notice or a Notice of Motion supported by the necessary affidavits.
- 2.12 Because of the lateness of time, the matter was stood down to the following day, 19 August 2022, for the hearing of the party's submissions with regard to the proposed application for leave to file the applicant's counterclaim. After hearing the party's submissions on 19 August 2022 I upheld the argument that the application of this nature cannot be moved verbally by Counsel from the bar and that it had to be a substantive application in writing, with the respondent being given an opportunity to file whatever opposing papers it may wish to file in resisting the application. By agreement with the parties the further hearing of the action was postponed to 29 August 2022.
- 2.13 Subsequent to the postponement the applicant launched the present application by way of the Notice of Motion filed of record on 22 August 2022, accompanied by the supporting affidavit.
- 2.14 On 24 August 2022 the respondent filed its Notice of Opposition to the application as well as its opposing papers. The applicant filed its replying

papers on the following day, whereafter both parties filed their heads of argument in preparation for the hearing of the opposed application.

2.15 On the scheduled date of 29 August 2022 the application was argued by both parties before me. The main trial in the action was postponed to a date to be arranged subsequent to this judgment.

[3] In the supporting affidavit deposed to by its Senior Legal Admin Officer, one Mr Dayimani, the applicant admits engaging the respondent as alleged. It further contends that after the respondent had issued some invoices against the applicant some of such invoices were paid but in due course the applicant had realised that it had overpaid the respondent and refused to pay the subsequent invoices. After being served with the respondent's summons in the action on end December 2019 it had considered the overpayment allegedly made to the respondent to be due for a refund. The amount of the alleged overpayment was finally calculated on 20 August 2021 and a document depicting same was transmitted to the applicants' legal team "*for their consideration and necessary action on 28 August 2021*". The affidavit states that "*this the defendant did as it was desirous to file the counterclaim*".

[4] The affidavit further goes on to state that the failure to file its counterclaim was due to a *bona fide* mistake caused by an oversight on the part of the defendant's legal team, especially given that the issue of overpayment is clearly set out in the defendant's amended plea. It is further contended that the defendant was at all material times under the impression that the counterclaim had been filed and it was only during consultation and preparation for the trial with the applicants' new Counsel on 12 August 2022 that it

was pointed out that no counterclaim had been filed. Condonation is then sought for the late filing of the counterclaim on the basis that the failure to file it with the plea was not due to fault on the part of the applicant.

[5] It is significant that nowhere in its founding affidavit does the applicant categorily state that there was any stage when it had expressly instructed its legal team to file a counterclaim to the respondent's claim.

[6] In its opposing papers the respondent contends that no proper case has been made by the applicant for the Court to exercise its discretion in favour of allowing the applicant to deliver its counterclaim at this late stage. It argues that there has been no overpayment to it by the applicant that would justify any counterclaim and that in fact the applicant is indebted to it for the amount claimed in the summons. In its plea and amended pleas the applicant has falsely alleged overpayment but the issue of a counterclaim has never been raised until two days before the trial date, which stance it considered as a ruse on the part of the applicant to delay the trial.

[7] The respondent further points out that on 17 and 18 August 2022 the trial commenced and got underway without the applicant making any indication to the Court that it intends to bring a counterclaim or drawing a substantive application requesting the Court's leave to file a counterclaim before the trial got underway and plaintiff testified in chief to a finish.

[8] The respondent further points out in its affidavit that even if there had in fact been any overpayment, which is vehemently denied, the applicant's contention that it had become aware of such overpayment as early as at July 2018, would render its claim for any repayment for such alleged overpayment to have prescribed in July 2021. The respondents further contend that the sudden appetite for the applicant to lodge a counterclaim for an alleged overpayment may have been sparked off by the plaintiff's evidence in chief that no claim has been lodged against it by the applicant for any overpayment.

[9] The respondent further submits that the applicant's sudden application to file a counterclaim after observing and hearing the plaintiff's evidence in chief in the trial is irregular and prejudicial to it. The respondent finally argued that the applicant has not met the requirements that would persuade the Court to allow the delivery of the proposed counterclaim at this very late stage in the middle of the trial.

[10] In its replying affidavit the applicant contends that it was not aware that its counterclaim had not been filed much earlier during the pleading stage. However, to its replying affidavit the applicant has annexed an email addressed by its erstwhile Counsel to its instructing attorneys dated 1 December 2021 where Counsel seeks instructions with regard to the counterclaim and enquires whether the applicant seeks to persist with same and, if so, what is the nature of the counterclaim is. She further seeks its quantification.

[11] On the same day, (1 December 2021) Counsel's email is forwarded to the applicant's legal advisor that is seized with the matter, asking for instructions. Another email from applicant's Counsel dated 5 December 2021 is addressed by applicant's then Counsel to, amongst others, the instructing attorney and the same applicants' legal officer (Mr Dayimani). In that email Counsel points out that she has not received instructions with regard to the counterclaim. She repeats that if the applicant still wishes to pursue same it should be properly quantified, in which event the Notice to amend sent with the email for service should not be served. The email was not responded to by any of the parties to whom it was sent.

[12] On 8 December 2021 the applicant's instructing attorney again sent another email to Mr Dayimani, asking him to furnish instructions as to whether the Department is still pursuing the counterclaim. No response came forth from Mr Dayimani with regard to the issue of the counterclaim. In his replying affidavit Mr Dayimani states that he was already on leave by 8 December 2022 and that he never took note of the email, in which event he would have responded to same. I assume that reference to 8 December 2022 was in fact meant to refer to 8 December 2021, since December 2022 is not yet upon us.

[13] Rule 24(1) of the Rules, in terms of which the present application is brought, provides, in part, that:

“A defendant who counterclaims shall, together with his plea, deliver a claim in reconviction setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage . . .”

[14] The criteria in an application for relief under Rule 24(1) are that:

- (1) There must be a reasonable and acceptable explanation for the lateness; and
- (2) The defendant must show an entitlement to institute a counterclaim.¹

[15] On the facts of this matter I am not satisfied that any of the requirements set out above have been satisfied.

[16] On its own showing, the applicant became aware of the alleged overpayment that gave rise to the contemplated counterclaim way back before the summons in the action was issued on 10 December 2019. After the service of the summons on the applicant on that date the applicant contends its founding affidavit that *“the overpayment then became due to be refunded”*. However, for some unexplained reasons, the applicant pleaded to the summons without raising the counterclaim. Even after doing its *“extensive calculations”* on 20 August 2021, more than 8 months after the service of the summons on it and after it had quantified the alleged overpaid amount, the counterclaim was not brought. As already stated above, nowhere in any of its affidavits does the applicant contend to have actually instructed its legal team to bring the counterclaim on its behalf. All attempts by the legal team to obtain specific instructions from the

¹ See *Lethimvula Healthcare v Private Label Promotion* 2012 (3) SA 143 at 146 [8]l.

applicant regarding the alleged overpayment and counterclaim were never responded to.

[17] There is no reasonable and acceptable explanation that explains the lateness in bringing the counter application or approaching this Court only at this late stage for leave to file same. The applicant's attorneys' letter of 12 August 2022, contending that it was only discovered during consultation on that very day that the applicant has a counterclaim against the respondent, only serves to muddy the waters even further for the applicant. It directly contradicts the contentions in the applicant's founding affidavit.

[18] In those circumstances the applicant fails at the first post with regard to the requirements that it needs to satisfy to qualify for the relief sought.

[19] As indicated above, the second requirement is for the applicant to show an entitlement to institute the envisaged counterclaim. Despite the applicant stating in para 15 of its founding affidavit that "as can be gleaned from the counterclaim, which is filed herewith, the plaintiff has shown such entitlement, worth ventilating upon during the current trial proceedings in Court", no copy of the intended counterclaim was annexed to any of the applicant's affidavits. Upon enquiry, the applicant's Counsel informed me that the applicant's camp had later decided not to annex a copy of the counterclaim referred to in the paragraph.

[20] In the absence of such document it is not possible for this Court to assess and satisfy itself of the applicant's entitlement to institute a counterclaim. Amongst other things there is a possibility (I am not putting it any higher than that) that where the applicant claims to have known about the alleged overpayment way back in 2018, its claim or entitlement to counterclaim may well have prescribed. In my view that fact has a direct bearing on the applicant's requirement to show an entitlement to institute the proposed counterclaim at this stage. The applicant contends that it calculated and quantified the alleged overpayment that is the foundation for its intended counterclaim on 20 August 2021. This was before the third amendment of its plea, which was only delivered on 26 January 2022, and the fourth amendment of the plea that was delivered on 25 July 2022. There is no explanation as to why the counterclaim was not lodged with any of these amendments.

[21] It is for those reasons that I am of the view that the applicant has failed to satisfy any of the criteria referred to above.

[22] A further consideration that I consider to be relevant on the facts of this case is the stage at which this application in terms of Rule 24(1) has been brought. As shown above, *litis contestatio* in this matter was reached and passed way back. Throughout the various stages of case flow management and other pre-trial proceedings both parties had submitted that the case was trial ready, hence it was allocated a date for hearing. There was nary a beep or a tweet by the applicant's legal team about the filing of a counterclaim. Even after the applicant's present Counsel had taken over the

running of the matter and realised that no counterclaim had even been brought, despite its necessity, and after the respondent had refused consent to its bringing, the application was not piloted. There is authority to the effect that to allow the creation and filing of new pleadings long after the pleadings have been closed would render the principle of *litis contestatio* virtually meaningless.² *A fortiori* in my view where the trial has even started and the plaintiff has finished giving its evidence in chief.

[23] In my view at the latest immediately the refusal by the respondent's team for the belated filing of the counterclaim was given the applicant's team should have launched the application in terms of Rule 24(1) before the trial had actually commenced.

[24] The Rule merely refers to the Court allowing the counterclaim to be delivered at a later stage. The later stage is not defined. Neither I nor Counsel for the parties could find any authorities dealing with that aspect. I am of the view that such later stage cannot go beyond the commencement of the actual trial. To allow the trial to start and proceed on the issues as defined in the pleadings only to change (or add) horses midstream by allowing a counterclaim at that late stage would be unfair, unjust and prejudicial to the plaintiff, which would have shaped its case and evidence on the pleadings as they stand to deal with the issues as defined.

[25] Responding to my enquiry as to why the application was not brought before the trial started applicant's Counsel stated that they were loath to bring the application at

² See *Shell SA Marketing (Pty) Ltd v Wasserman t/a Wasserman Transport* 2009 (5) SA 212.

that stage as that would have inevitably resulted in the postponement of the matter straight away to enable them to file the counterclaim, which would re-opened the pleadings. When I pointed out to him that the application at this stage would have a similar effect in that if the order sought is granted the trial would, of necessity, have to be paused to enable the filing of the various consequential pleadings that may follow the filing of the counterclaim, he was constrained to concede the point.

[26] **In the result, the application is dismissed with costs.**

P ZILWA
JUDGE OF THE HIGH COURT
BHISHO

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Date Heard:

29 August 2022

Judgment Delivered:

01 September 2022