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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/ NO**

Case number: **223/2020**

In the matter between:

MACHTILT SUSANNA FERREIRA **PLAINTIFF**

and

FREDERICK JACOBUS SENEKAL **1st DEFENDANT**

MATSEPES INC **2nd DEFENDANT**

FJ SENEKAL INC **3rd DEFENDANT**

CORAM: **NAIDOO, J**

HEARD ON: **23 AUGUST 2022**

DELIVERED ON: **17 FEBRUARY 2023**

JUDGMENT – APPLICATION TO AMEND SUMMONS

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[1] This is an application by the plaintiff to amend the Summons and Particulars of Claim. The trial of this matter commenced on 3 May 2022, and is currently partly-heard before me. For convenience and to avoid confusion, I will refer to the applicant as the plaintiff and the respondents collectively as the defendants or individually where necessary. The plaintiff issued summons against the three defendants, namely the first defendant, Frederick Jacobus Senekal (Mr Senekal), the second defendant, Matsepes Inc (Matsepes or the 2003 company), the third defendant, FJ Senekal Inc for payment of monies owed to her, which she alleges was paid to the first and second defendants for professional services rendered to her. She alleges that the first defendant made certain fraudulent representations to her which resulted in her paying the money to him and the second defendant. The relief claimed in the summons reads, *inter alia*, as follows:

> "1. Payment of the amount of R412 042.74;
>
> 2. Payment of interest on the amount of R412 042.74 at the rate of 9.5% per annum *a tempora morae*;
>
> 3. Costs of suit."

[2] The background to the matter is that during 2016, the plaintiff instructed Mr Senekal to represent her in motion proceedings in this Division, and Mr Senekal accepted the mandate, and subsequently launched an application on her behalf, in this court. The plaintiff alleges that Mr Senekal, in representing her, as a director of the second defendant, fraudulently represented to her that he was an

admitted attorney, who was in possession of a valid fidelity Fund Certificate (FFC) and had complied with all legal requirements to represent her, as set out in the Attorney's Act 53 of 1979, which was applicable at the time. It is not in dispute that over a period of time, he issued several invoices for disbursements and professional services rendered, which the plaintiff paid in the total amount of R412 042.74. Such payments were made into the Trust Account of the second defendant.

[3] The plaintiff asserts that she was induced by the fraudulent misrepresentation made by Mr Senekal to pay the said amount in the belief that he was entitled to charge such fees and disbursements and that such amounts were due, owing and payable to him. The plaintiff claims that she is entitled to be reimbursed in the amount of R412 042.74. together with interest thereon, as claimed in the summons.

[4] As I indicated, the trial commenced and the evidence of the plaintiff and Ms Christina Jacoba van der Merwe (formerly Marais) was led, at the end of which the matter was adjourned for the plaintiff to properly investigate and consider the issues raised in Ms van der Merwe's evidence, after the late introduction by the first and third defendants of a FFC, which they alleged was relevant to this matter. When the matter resumed on 23 August 2022, the applicant applied to file a

supplementary affidavit to deal with new evidence in respect of the second defendant's identity, that had come to her attention after the previous adjournment and shortly before the hearing on 23 August 2022. There was no opposition to this application and it was accordingly granted as prayed. The plaintiff also filed an application to amend her Summons and Particulars of Claim by deleting the reference to the second defendant as "Matsepes Inc" and replacing it with "Matsepes (Bloemfontein) Inc, with registration number 1998/020850/21." The plaintiff sought costs of the application in the event that the application was opposed. This application was opposed by the second defendant, who had also filed a Notice of Objection to the proposed amendment.

[5] I pause to mention that during the course of the plaintiff's *viva voce* evidence in court , it emerged that the second defendant (Matsepes Inc) and Matsepes (Bloemfontein) Inc are two separate entities with different registration numbers, who practise from the same premises. The registration number of the second defendant is 2003/023083/21 (the 2003 company), while that of the Matsepes (Bloemfontein) Inc is 1998/020850/21 (the 1998 company). The plaintiff asserts that at the time that Summons was issued she was unaware of the existence of two separate entities, as Mr Senekal, when he rendered the services to her, appears to have done so as a representative of both entities. He intermittently used two different letterheads in the course of dealing with her matter. She made all payments into the Trust Account of Matsepes (Bloemfontein) Inc. By way of example, the plaintiff attached to her Founding Affidavit, two invoices. The first one (MSF1), dated 2 May 2017, is headed *"Matsepes Inc"*, with no

company registration number. At the bottom of the invoice, banking details of the company are provided as follows: *"Matsepe Inc,. Trust Account, Standard Bank of S.A. Limited, Brandwag, Acc. :041185293, Code : 055534."* The file number on this invoice was reflected as "*FER37/0001"* and the subject matter was ostensibly *"Japie De Vos Boerdery Trust // The Raisin Company".*

[6] Approximately three months later she received another invoice dated 31 August 2017 (MSF2), which was headed *"Matsepes (Bloemfontein) Inc/Ing, Reg. No. 2003/023083/21."* The matter in respect of which the invoice was rendered is reflected as *"Ferreira/ N.P. Maree N.O & The Master of the High Court Bloemfontein"*. The file number on the invoice is *"FER37/0001"*. The banking details reflected at the bottom of the invoice are as follows: *"Matsepe Inc,. Trust Account, Standard Bank of S.A. Limited, Brandwag, Acc. :370 886 216, Code : 051-001".* I mention that the letterhead of the covering letter to which the invoice was attached bears the same details as the invoice, and sets out the banking details as reflected on the invoice, with an instruction to pay into that account. It also bears mentioning that the address, contact and postal details are identical to the invoice dated 2 May 2017. The plaintiff, being unaware that a different company with different banking details was reflected on the invoice, paid the amount due on the invoice dated 31 August 2017 into the account of Matsepes (Bloemfontein) Inc with the banking details as reflected on the invoice dated 2 May 2017, having ostensibly saved that account number on her banking profile. She attached proof of such payment.

It is not in dispute that the account into which the plaintiff made payments was the bank account of the 1998 company

[7] The plaintiff asserts that the first time she became aware that there were two separate companies was when the respondents filed their plea to the Summons. In her reply to the plea she asserted that she was never informed that two separate entities (being the 1998 company and the 2003 company) practised from the same address. It is, however, common cause between the parties that the plaintiff contracted with Matsepes (Bloemfontein) Inc and, as indicated, that all payments, (and specifically the amount of R412 042.74 claimed in the summons) that she made were paid into the Trust Account of Matsepes (Bloemfontein) Inc, (the 1998 company). In addition, the FFC, issued by the Legal Practice Council (LPC), and which was attached to the papers, reflects that the FFC was issued to Mr Senekal *"of Matsepes Reg 1998/020850/21".*

[8] The plaintiff asserts that a company search revealed that the 1998 company is listed as "Matsepes (Bloemfontein) Inc" and the 2003 company is listed as "Matsepes Inc", yet the correspondence and other documents between the plaintiff and Mr Senekal refers interchangeably, to the 1998 company as Matsepes Inc and the 2003 company as Matsepes (Bloemfontein) Inc. In the plea of the respondents, they refer to the 1998 company as Matsepes Bloemfontein Inc (without the brackets), creating more confusion. After the plaintiff's application to file a supplementary affidavit was

granted, she did in fact file such an affidavit, attaching the correspondence that passed between the LPC and the two Matsepes entities. After receiving complaints from members of the public, the LPC launched an investigation to ascertain exactly what the position is with the two entities (the 1998 and the 2003 company), who were the directors of each, and why their respective details were used interchangeably in the same matter. It appears that this aspect may well still be the subject of further evidence to be led in this matter.

[9] For this reason, I do not propose to deal in detail with this aspect, save to say that there was seemingly a great deal of confusion created by the directors of both the 1998 company and the 2003 company, which warranted the attention of the LPC, as such practices were in conflict with the Legal Practice Act and the Rules of the LPC, and, as pointed out by the plaintiff, the Companies Act as well. It seems that, as a result of this, the LPC was not able to distinguish the Trust Accounts of the two companies, and addressed several questions to the respective directors in order to obtain clarification.

[10] The Answering Affidavit of the second defendant (the 2003 company) was deposed to by Paul De Lange, in his capacity as a director of that company. According to the electronic search of the database of the Companies and Intellectual Property Commission (CIPC), Mr De Lange was appointed as a director of the 2003 company on 15 February 2021. This is not in dispute. In her Replying Affidavit, the plaintiff raised a point *in limine*, in which she argued that the content

of the Answering Affidavit, in its entirety, constitutes inadmissible hearsay evidence, and falls to be struck out with an appropriate order as to costs. The plaintiff bases this assertion on the following grounds:

10.1 Mr De Lange was appointed as director of the second defendant on 15 February 2021, whereas the cause of action between her and Mr Senekal arose during 2017, approximately four years before Mr De Lange became a director.

10.2 he provides no factual background or substantiation for his allegation that he has personal knowledge of this matter, nor does he make any allegation of having any involvement in or personal knowledge of the entity known as Matsepes (Bloemfontein) Inc. Therefore, he cannot have personal knowledge of the facts of this matter. The only person with such knowledge and who could swear positively to the facts is Mr Senekal, who chose not to respond to the issues raised in the Founding Affidavit, either by way of opposing the Application to Amend or by filing a Supporting Affidavit to the Answering Affidavit.

[11] The plaintiff, in any event replied to the Answering Affidavit, and repeatedly points out that Mr De Lange either makes allegations, or fails to tender crucial explanations, when such were required, indicating that he does not have personal knowledge. I will mention some of these aspects in the course of this judgment. Mr De Lange

readily concedes that all the payments made by the plaintiff were deposited into the Trust account of the 1998 company. He pointedly alleges that he is a director of the 2003 company, and not of the 1998 company, creating the impression that he has no involvement with the 1998 company. He also makes much of the fact that the plaintiff knew as long ago as June 2020, when the plea was filed that there were two companies in existence, and, further, that had she taken the trouble to conduct a CIPC search before issuing summons, she would have known which company she had to sue. As an attorney with seventeen years' experience, she ought to have done so to prevent the predicament she finds herself in now.

[12] He alleges further that this application is an application to substitute a party, disguised as an application to amend the summons. He also denied that there will be no prejudice to the second defendant if the application is granted. The second respondent would cease to be a party to these proceedings and would be out of pocket in respect of the costs of this matter, as it was "dragged" through expensive litigation and trial by the plaintiff. The court should therefore award costs in its favour.

[13] It is well established in our law that an amendment to a summons will usually be granted unless it causes prejudice to the other party, which cannot be cured by an appropriate order for costs. In this matter the conduct of Mr Senekal, who represented the plaintiff clearly caused

confusion and the plaintiff cannot be blamed for concluding that such misrepresentations were intentional and designed to extract money from her. From a perusal of the summons and annexures thereto, it is clear that the 1998 and 2003 companies are so intertwined that it is not immediately possible to distinguish the one from the other, for instance the covering letter and invoice dated 31 August 2017 bears the name of the 1998 company but the banking details of the 2003 company, with an instruction in the covering letter to pay into the latter account. The plaintiff had previously added the details of the 1998 company as a beneficiary on her banking profile, and simply proceeded to make payment into that bank account. If it is not pointedly brought to the attention of the reader that this was a different bank account to the one the plaintiff previously made payment to, it would be almost impossible, as day-to-day commercial transactions go, to spot the difference.

[14] The LPC itself had difficulty in distinguishing between the Trust Accounts of the two entities. As I pointed out earlier, the address, postal and contact details of both entities are identical, making it very difficult to tell them apart. It is only the defendants who would have knowledge of the true situation regarding the professional and commercial/ financial operations of the two entities. The summons and annexures thereto make it abundantly clear that the plaintiff transacted with the 1998 company, paid all amounts claimed to that entity, and that in citing the second defendant as she did, she clearly intended to cite the 1998 company, and not the 2003 company. Any

person, and particularly a qualified and experienced attorney, would have immediately realised this.

[15] Mr De Lange only joined the 2003 company in February 2021, and I am in agreement with the plaintiff's submissions that he would not have personal knowledge of anything that occurred prior to his appointment as director of the 2003 company. He offers no explanation as to how the details of the two entities were used so interchangeably, nor can he reasonably have done so because of a lack of personal knowledge. He merely alleges that the details of the 2003 company appeared "erroneously" on the letterhead of the 1998 company, without any further explanation. He has given no indication of how he acquired the knowledge he did, and I am not inclined to have regard to allegations he has made about facts or events prior to February 2021.

[16] The directors of the 2003 company should and ought to have realised immediately upon receipt of the summons that the 1998 company was the intended second defendant. They said nothing about this and chose to defend the matter. I mention that the third defendant was on record as the legal representative of all three defendants in filing the Notice to Defend. Mr Senekal, with intimate knowledge of who the plaintiff transacted with, is the sole director of the third defendant. His failure to draw this to the attention of the directors of the 2003 company and then proceed to defend the matter in respect of all three defendants is questionable. The election of Mr

Senekal and the third defendant not to oppose the Application to Amend the Summons, and Mr Senekal's failure to explain those matters which Mr De Lange unsuccessfully attempted to do, are also telling.

[17] As I indicated earlier, there is no dispute that it was the 1998 company that the plaintiff signed an agreement with when she instructed Mr Senekal to represent her, and that it was into the bank account of the 1998 company that all invoiced amounts were paid. It is also not in dispute that, at the time she issued the summons in this matter, she was unaware of the existence of two separate entities using the name "*Matsepes Inc*". The 2003 company, Matsepes Inc, was well aware of the situation after receipt of the summons, but chose to defend the matter regardless. It begs the question why the 2003 company would do so. Mr De Lange, clearly with full knowledge of this situation, communicated with the plaintiff's attorney two months prior to the date on which the trial was scheduled to commence, enquiring if the plaintiff was proceeding with the action. The plaintiff's attorneys responded immediately and questioned his interest in the in the matter, whether his firm is representing Matsepes (Bloemfontein) Inc (1998) or Matsepes Inc (2003) and requested him to explain the relationship between these ostensibly two identical entities using the name "Matesepes". Mr De Lange did not respond to that letter at all.

[18] In my view, it would have been immediately clear to the defendants, and particularly the second defendant that it was the 1998 company

and not the 2003 company that was the intended second defendant. It is obvious that the 2003 company did nothing to draw to the plaintiff's attention at that stage that there were two separate entities and that she had cited the 2003 company, as would be expected of a courteous, collegial and *bona fide* colleague. The 2003 company chose to defend the matter and enter into protracted litigation, knowing full well that it was not the second defendant. Any costs it incurred in the process is of its own doing and it is not open to the 2003 company to look to the plaintiff for such costs.

[19] In view of what I have said about the manner in which the two entities conducted themselves, that fact that the two entities were so intertwined in their interactions with the plaintiff, the latter could not be blamed for citing the 1998 company incorrectly. I was referred to the matter of *Mutsi v Santam Versekeringsmaatskappy Bp en 'n Ander 1963(3) SA 11 (O)*, where the facts are similar to the present matter. The court in that matter cited, at p17G, the matter of *De Stadler v Morris, 9 S.C. 480 at 481*, where the court remarked:

> 'The main object of a summons is to bring a defendant against whom claim is made into Court. If the Court is satisfied that the summons has been duly served on him, and that he knows that it is intended for him a misdescription of the defendant ought not to be held fatal to the summons. The Court has ample powers of amendment and ought not to scruple to exercise them in such a case.'

[20] The remarks of the court in *De Stadler* are apposite in this matter. I am satisfied that the summons was served on Matsepes (Bloemfontein) Inc, that it is in fact the 1998 company referred to in

this judgment, that it knew that the summons was intended for it and that it was in fact the plaintiff's intention to bring the 1998 company to court. I am accordingly of the view that the plaintiff is entitled to the relief she seeks. It is further my view that the opposition of Matsepes Inc, was unnecessary and frivolous, and the court would be justified in expressing its displeasure at such conduct by making an appropriate order as to costs.

[21] In the circumstances, the following order is made:

21.1 The Applicant/Plaintiff's Summons and Particulars of Claim be amended by deleting the reference to the Second Defendant as "Matsepes Inc", everywhere it appears, and replacing it with "Matsepes (Bloemfontein) Inc, Registration number 1998/020850/21";

21.2 Matespes Inc, Registration number 2003/023083/21 is directed to pay the Applicant/Plaintiff's costs of this application;

21.3 Matsepes Inc 2003/023083/21 will bear its own costs, if any, in this matter

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S NAIDOO J

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