

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 5561/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE

SIGNATURE

In the matter between:

QUATRA M INVESTMENTS (PTY) LTD
(Registration Number: 2008/004991/07)

Plaintiff

and

ESKOM HOLDINGS SOC LTD
(Registration Number: 2002/015527/30)

Defendant

JUDGMENT

VAN EEDEN, AJ

1. In this matter the plaintiff applies for leave to amend its particulars of claim, following an objection by the defendant in terms of rule 28(3). The plaintiff was represented by Mr A N Kruger and the defendant by Mr G L van der Westhuizen.
2. The existing particulars of claim reflect a claim based on an indemnity provided by the defendant to the plaintiff. It is alleged that the defendant instructed the plaintiff to cancel certain agreements it had concluded with a number of subcontractors. Since the defendant was aware that the plaintiff would suffer damages by the cancellation of such contracts, the defendant provided an indemnity to the plaintiff to hold it harmless against any damages it may suffer following upon such cancellation. Thereafter the plaintiff and the subcontractors reached a settlement agreement which was approved by the defendant. In consequence, the plaintiff claims that the defendant is liable to it in terms of the indemnity. It is also pleaded that on three separate occasions the defendant made payments to the plaintiff in terms of the indemnity agreement. The defendant stopped making these payments, in consequence of which the plaintiff sued for compliance.
3. The proposed amendment is not a model of clarity, but there is no objection thereto on the basis that the amendment, if effected, will be excipiable. The sole basis of opposition to the proposed amendment is that the claim that the plaintiff seeks to introduce by way of the amendment, has prescribed.
4. During argument Mr Kruger explained that the proposed amendment seeks to introduce an alternative claim to the indemnity. The alternative claim entails an

agreement concluded between the plaintiff and the defendant in terms of which the defendant claims the same amount from the defendant, based upon the same set of facts set out in the existing particulars of claim. Mr Kruger explained that the proposed amendment does not introduce a claim in terms of the Service and Lease Agreement (“SLA”) concluded between the plaintiff and the defendant. Mr Kruger stated that paragraph 4.3 of the defendant’s heads of argument misconstrued the proposed amendment. The paragraph reads as follows:

“4.3 *The cause of action pertaining to the indemnity claim is based on a right stemming from the alleged indemnity. That is not the right which forms the basis of the intended further alternative claim. The right on which the plaintiff relies for the intended further alternative claim arises from the alleged breach of the SLA, thus from a different contract between the plaintiff and defendant as the indemnity contract. It is a different right.*”

5. Once it is understood that the plaintiff is seeking to introduce an alternative claim based on what was agreed between it and the defendant, at the time that the plaintiff reached the settlement with the subcontractors, it becomes obvious that the proposed amendment seeks to introduce a debt that is substantially similar to the existing particulars of claim. Prescription does not enter the enquiry, because summons was timeously issued and formulated a claim against the defendant based on the indemnity. Thus, the rule laid down in **Associated Paint and Chemical Industries (Pty) Ltd v Smit 2000 (2) SA 789 (SCA) [13]** finds application.

6. It follows that the plaintiff is entitled to leave to effect the proposed amendment. During argument Mr Kruger conceded that Mr van der Westhuizen's submission that if the amendment is granted, there should be no order as to costs, should be sustained.

7. In the circumstances I make the following order:

7.1. The plaintiff is granted leave to amend its particulars of claim as set out in the plaintiff's notice in terms of rule 28 delivered on 17 August 2022.

H VAN EEDEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Counsel for the Applicant: Adv A N Kruger
Instructed by: CBJ Attorneys Inc

Counsel for Respondent: Adv G L van der Westhuizen
Instructed by: Maenetja Attorneys

Date of hearing: 20 July 2023

Date of judgment: