

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 55896/2021

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

08 MAY 2024
DATE

ML SENYATSI
SIGNATURE

In the matter between:

SIYAKHULA SONKE EMPOWERMENT

First

Applicant

CORPORATION PROPRIETARY LIMITED

FREDERICK ARENDSE

Second Applicant

and

REDPATH AFRICA LIMITED

Respondent

In re:

REDPATH AFRICA LIMITED

Applicant

and

SIYAKHULA SONKE EMPOWERMENT

First

Respondent

CORPORATION PROPRIETARY LIMITED

REDPATH MINING (SOUTH AFRICA)

Second

Respondent

PROPRIETARY LIMITED

FRED ARENDSE

Third Respondent

JUDGMENT

SENYATSI, J

Introduction

[1] This is application for amendment of the application to include certain relief and the application to file a supplementary affidavit in support of the relief. The application is opposed and in addition, the respondents have filed a counterclaim for consolidation of the underlying application with the action proceedings brought by the respondents.

Background

- [2] On 26 November 2021, the applicant (“RAL”) launched an application under the above-mentioned case number (“the deemed offer application”). At that stage, the basis of the application was that the first respondent (“SSC”), through the third respondent (“Arendse”), had allegedly engaged in a series of orchestrated and unlawful acts which constituted material breaches of a shareholding agreement (“the agreement”) in relation to the second respondent (“RMSA”), to which SSC and RAL are parties. The legal consequence of the conduct of SSC and Arendse, so contends RAL, was that SSC is deemed to have offered its entire shareholding in RMSA for sale to RAL in terms of various provisions of the agreement. RAL seeks a declaratory order to this effect, coupled with ancillary relief designed to give effect to the deemed offer (“the deemed offer relief”).
- [3] The basis for the deemed offer relief and all the background facts, are set out in the founding affidavit. The first and third respondents have opposed the application and delivered an answering affidavit and filed a counter-application in which they seek an order dismissing the deemed offer application, alternatively referring it to trial.
- [4] It is important to note at this stage that RAL contends that it wishes the application to be determined on the papers and does not seek a referral to trial. RAL contends that, it therefore will seek, when the main application is heard, a final order on the basis that there are no relevant disputes of fact. If it fails in this regard, then it will be held to its election, as *dominis litis*.
- [5] Subsequent to the launching of the deemed offer application, RAL alleges that SSC repudiated the agreement by refusing to pay the purchase price (which was, in terms of the agreement, due for payment no later than 1 January 2022). RAL accepted SSC’s repudiation and cancelled the

agreement. However, the parties are engaged in various disputes relating to SSC's shareholding in RMSA and it was anticipated by RAL that SSC would dispute RAL's entitlement to cancel the agreement. RAL states that it was accordingly considered appropriate to seek declaratory relief from this Court to the effect that SSC did indeed repudiate the agreement and, therefore, that RAL was entitled to cancel it ("the cancellation relief"). True to form, SSC has disputed the validity of the cancellation, contending that, in the circumstances, its refusal to pay does not constitute a repudiation.

- [6] On 3 March 2022, RAL filed a rule 28 notice in which it sought to amend its notice of motion in the deemed offer application to include a prayer that SSC has repudiated the agreement. Together with the rule 28 notice, it filed a supplementary affidavit in which it explained its basis for seeking the amendment and elaborated on its allegations supporting the cancellation relief. The amended notice of motion will, so submits RAL, if this amendment application is granted, render the cancellation relief into RAL's primary cause of action, with the deemed-offer relief sought in the alternative.
- [7] SSC and Arendse filed a notice in which they objected to the proposed amendment. It therefore became necessary, so contends RAL, for it to bring the present application for leave to amend its notice of motion to introduce the cancellation relief. In this application, RAL also seeks an order admitting a supplementary affidavit which explains its claim for the cancellation relief.
- [8] The question whether SSC has repudiated the agreement is closely linked to the deemed offer application. The cancellation of the agreement, if valid, so argues RAL, overtakes the relief sought in the deemed offer

application and renders it moot. If the cancellation is not valid, then it is still necessary to determine the deemed offer relief. RAL furthermore submits that it would therefore be inconvenient and give rise to the potential of different judgments covering similar subject-matter, for the cancellation relief to be addressed in separate proceedings. For the reasons given below, it is therefore submitted that RAL should be given leave to amend its notice of motion and to file its supplementary affidavit explaining its application based on SSC's repudiation.

- [9] With respect to the deemed offer relief in underlying action, it is important to sketch some relevant clause of the shareholder agreement concluded between the parties. The are the following:
- a. Clause 13.2.5 of the agreement prohibits SSC from encouraging or enticing or inciting or persuading or inducing any prescribed supplier or prescribed customer to terminate its relationship with RMSA.
 - b. Clause 13.2.6 of the agreement prohibits SSC from furnishing any information or advice to any prescribed supplier or customer or use any other means or take any other action which is directly or indirectly designed to result in the supplier or customer terminating its association with the company or moving its business elsewhere.
 - c. In terms of clauses 12 and 14 of the agreement, a breach of these obligations means that SSC is deemed to have offered its entire shareholding in RMSA to RAL for sale. There is then a system to identify the purchase price of the shares in terms of a valuation methodology.

- d. In the founding affidavit in the deemed offer application, RAL has set out details of a series of letters sent by Arendse on behalf of SSC to various customers and stakeholders in RMSA, either interfering with the relationship between RMSA and its service providers or customers or interfering with the banking relationship between RMSA and its bank.

On the basis of these various letters, RAL contends that the deemed offer provisions of the agreement have been triggered. All of this is addressed in the application which was launched in November 2021.

[10] Regarding the cancellation relief:

- a. In terms of clause 4.2.5 of the agreement, SSC became obliged to pay the purchase price of its shares in RMSA by no later than 1 January 2022.
- b. On 31 December 2021, SSC's attorneys wrote to RAL's attorneys. For reasons that will be ventilated in due course (in this application, if the amendment is granted), SSC conveyed its decision not to pay the purchase price to RAL but rather to pay it into the trust account operated by Cliffe Dekker Hofmeyr, the attorneys acting for SSC.

[11] RAL contends that because of the various disputes between the parties, it considered it appropriate to seek declaratory relief from this Court to the effect that the non-payment of the purchase price by SSC was indeed a repudiation of the agreement justifying RAL's decision to cancel it. The purpose of the amendment application is to amend the notice of motion to

seek this relief as the primary relief in this application, with the deemed offer relief sought in the alternative.

[12] SSC and Arendse, in opposing the amendment, first, contend that the amendment RAL seeks to introduce is expiable as it hopes to introduce a new cause of action which wholly contradicts the relief originally pursued by it in the main application. They furthermore state that had RAL pursued the amended relief in a fresh application, it would not be able to simultaneously pursue the main application, as it would not be entitled to seek cancellation of an agreement in one proceeding while attempting to specifically enforce the agreement in another. RAL cannot so approbate and reprobate.

[13] Second, the SSC and Arendse are further prejudiced by RAL seeking to file a further affidavit enclosing fresh facts in support of the amended relief where its founding affidavit is lacking. RAL seeks the amendment having the benefit of the SSC and Arendse's answering affidavit and counter application in the main application which preceded the RPA's request for the proposed amendment.

Issues for determination

[14] The issue for determination is whether the amendment raises a triable issue and whether the proposed amendment will not cause prejudice the other parties.

Legal principles

[15] The cardinal legal principle in this application is Uniform Rule 28 itself which reads as follows: -

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

(2) The notice referred to in subrule (1) shall state that unless 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.

...

(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit. [underlining added for emphasis]. In this part, the Uniform Rule refers to “at any stage before judgment” regarding the timing of (or stage until when it is conventionally permissible for the Court to grant) leave to amend.¹

[16] An application for amendment will always be allowed unless it is made *mala fide* or would cause prejudice to the other party which cannot be

¹ *PKX Capital (Pty) Ltd v Isago At N12 Development (Pty) Ltd* [2023] ZAGPPHC 646 (7 August 2023) at para 23.

compensated for by an order for costs or by some other suitable order such as a postponement.²

[17] In *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and another*³ and *Commercial Union Assurance Co Ltd v Waymark NO*,⁴ the basic principles to affect the exercise of the discretion of the Court whether to grant or refuse leave to amend were accurately summarized.⁵ It is trite that the discretion – as always – is to be exercised judicially in the light of all the facts and circumstances before a Court.⁶

[18] An amendment application will be refused if the amendment would introduce a pleading which is excipiable – either because it is impermissibly vague or because it discloses no cause of action.⁷ Another example of prejudice is where a party, through an amendment, seeks to withdraw an admission.⁸

[19] The example of the type of prejudice falling into this category given in *Imperial Bank Ltd v Barnard and others NNO*⁹, was an amendment which seeks to introduce a claim which has prescribed. Another example of prejudice which would lead to the refusal of an amendment is if the

² *Imperial Bank Ltd v Barnard and others NNO* 2013 (5) SA 612 (SCA) at para 8.

³ 1967 (3) SA 632 (D) at 640H-641C.

⁴ 1995 (2) SA 73 (Tk) at 77F-I.

⁵ *Caxton Ltd and others v Reeve Forman (Pty) Ltd and another* 1990 (3) SA 547 (A) at 565G and *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 957G-H. See generally Cilliers, AC, Loots, C and Nel, HC. Herbstein and Van Winsen: *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th edition, Jutastat e-publications (last updated: 30 November 2021) (hereafter Herbstein & Van Winsen Civil Practice) at 675-693.

⁶ *GMF Kontrakteurs (Edms) Bpk and another v Pretoria City Council* 1978 (2) SA 219 (T) at 222B-D; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n ander* 2002 (2) SA 447 (SCA) *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 SA 447 (SCA) at par 33. See generally Herbstein & Van Winsen Civil Practice at 676.

⁷ *Imperial Bank Ltd v Barnard and others NNO* 2013 (5) SA 612 (SCA) para 8.

⁸ *Small Enterprise Finance Agency Soc v Razoscan (Pty) Ltd* 2022 JDR 0508 (GP) at para 6.9

⁹ *Imperial Bank Ltd v Barnard and others NNO* 2013 (5) SA 612 (SCA).

amendment would introduce a pleading which is excipiable – either because it is impermissibly vague or because it discloses no cause of action.¹⁰ Another example of prejudice is where a party, through an amendment, seeks to withdraw an admission¹¹ (but even then only in limited cases; for example where the plaintiff for some reason no longer has access to the evidence to prove its response to a fact previously admitted by the defendant).

[20] In *Man in One CC v Zyka Trade 100 CC*¹², the Court said the following in regard to amendment of pleadings:

“The respondents have argued that a party seeking an amendment at a late stage does not do so as a matter of right but is seeking an indulgence from the court and there is no justification to do so after a seven-year delay. It has however been held that in the absence of prejudice to an opponent, an amendment may be granted an any stage before judgment, despite such delay and however careless the mistake or omission may have been (*Krogman v Van Reenen [1926 OPD 191]*). It is also my view that although the trial has commenced, the parties are not 'deep' into the trial in that it was on its first day and the applicant was leading evidence in chief from its first witness when it sought a postponement for purposes hereof. In *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another [1967 (3) SA 632 (D) at 642H]* the court held that: ‘In my judgment, if a litigant has delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment.’”

¹⁰ *Recycling and Economic Development Initiative of South Africa v Electronic Media Network* 2022 JDR 0456 (GJ) at para 8

¹¹ *Small Enterprise Finance Agency Soc v Razoscan (Pty) Ltd* 2022 JDR 0508 (GP) at para 6.9

¹² 2022 JDR 0704 (FB) at para 14.

[21] In *Summer Season Trading v City of Twane*¹³, Basson J pointed out that:

“the decision of *Affordable Medicines Trust and Others v Minister of Health and Others*¹⁴, the Constitutional Court echoed the well-known principles developed over many years but added that the question ultimately should always be ‘what do the interest of justice demand?’” As the Court said in *Affordable Medicines*: “The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*¹⁵. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?”

Reasons

[22] SSC and Arendse state that RAL’s approach prejudices them. They argue that the main application was instituted on 26 November 2021. SSC filed its answering affidavit and counter application in the main application on 17 January 2022. RAL went on to claim that SCC had allegedly repudiated the shareholders agreement on 31 December 2021, in a letter dated 10 February 2022, weeks after SSC had filed its papers, and even more so after the repudiation had allegedly occurred. I do not see how SSC and

¹³ 2021 JDR 0291 (GP).

¹⁴ 2006 (3) SA 247 (CC) at para 9.

¹⁵ NO 1995 (2) SA 73 (TkGD)

Arendse are prejudiced. This is so because the amendment sought is way before the judgment and in accordance with the authorities quoted above. What our law permits is an amendment of pleadings before the trial is finalized. There is therefore no basis for suggesting that SSC and Arendse are prejudiced.

[23] SSC and Arendse also contend that the proposed amendment is excipiable. RAL would not be able to seek the cancellation relief in a new application because it cannot enforce the agreement (ie, the premise of the deemed offer application) and accept SSC's alleged repudiation at the same time. They furthermore contend that the facts underpinning the two causes of action are different does not change the fact that RAL can only have "a single intent". It cannot make its intent conditional – ie, by asking for the relief in the alternative. It either wants to cancel the agreement or enforce it, but it cannot do both.

[24] SSC and Arendse, so they contend furthermore, have been prejudiced by the fact that, by the time RAL wrote to them to inform them that it accepted their repudiation – ie, on 10 February 2022 – they had already filed their answering affidavit and counter-application in the deemed offer application. Having already done so, they could not then be called upon to answer the cancellation cause of action which is mutually destructive of the deemed-offer relief. They say that this prejudice arises from the fact that the cancellation of the cause of action was formulated by RAL having already seen the answering affidavit in the deemed-offer application. They say that they would have presented their case differently had the cancellation cause of action been introduced timeously. They say that RAL's approach "also destroys our right to bring a counter application in response to the cancellation cause of action it if had been brought by way of a separate application [*sic*]".

[25] The contentions by SSC and Arendse are premised on the notion of allegedly inconsistent remedies as if this were impermissible as a rule of law. On that score, *Christie*¹⁶ summarises the legal position of election as follows:

“The innocent party’s choice is subject to what is usually known as the doctrine of election. Enforcement and cancellation being inconsistent with each other, or mutually exclusive, the non-defaulting party must make an election between them; and cannot both approbate and reprobate the contract by seeking to enforce both remedies simultaneously. The doctrine is stated by Watermeyer AJ in *Segal v Mazzur*¹⁷: ‘Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has a choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct: see *Croft v Lumley (1858) 6 HLC 672 at p 705* per Bramwell B; *Angehrn and Piel v Federal Cold Storage Co Ltd 1908 TS 761 at p 786* per Bristowe J. As already stated, the question whether a party has elected not to take advantage of a breach is a question of fact to be decided on the evidence, but it may be that he has done an act which, though not necessarily conclusive proof that he has elected to overlook the breach, is of such a character as to lead the other party to believe that he has elected to condone the breach, and the other party may have acted on such belief. In such a case an estoppel by conduct arises and the party entitled to elect is not allowed to say that he did not condone the breach.’ This passage makes clear

¹⁶ Christie Law of Contract in South Africa 8th Ed at para 14.

¹⁷ 1920 CPD 634 at 644 - 645

the true nature of the doctrine of election. It is not a mechanical rule of law but a combination of waiver and estoppel – the onus is on the defendant to prove that, as a question of fact, the plaintiff has waived the relief claimed or, failing such proof, that the plaintiff is estopped from claiming it – reinforced by a logical bar to claiming inconsistent remedies, but only if the claims are truly inconsistent. So the double-barrelled procedure of claiming enforcement with an alternative claim for cancellation and damages is permissible, more especially when the plaintiff, through no fault on its part, is not aware of the full facts, since the doctrine of election presupposes full knowledge of all the relevant facts. It is also permissible to claim cancellation or alternatively enforcement, or vice versa, on different factual averments, that is on the basis that the main factual averment may not be proved. The question expressly left open in *Tillett v Willcox 1941 AD 100 at 108* - whether the issue of a summons claiming a particular type of relief necessarily bars a subsequent claim for inconsistent relief - can, on the principles considered in the previous paragraph, be answered with a fair measure of certainty. It will normally act as such a bar because it is strong evidence of waiver of the inconsistent remedy, but a summons for specific performance does not bar a subsequent claim for cancellation and damages if the plaintiff's change of mind follows the defendant's persistence in his refusal to perform. Similarly, a summons for cancellation and damages, issued in the mistaken belief that the defendant has repudiated, does not bar a claim for enforcement after the mistake has been discovered. In neither case is waiver proved, but the issue of summons in such a case might give rise to an estoppel. A plaintiff who carries his summons for specific performance through to judgment has irrevocably elected not to cancel, and a subsequent claim for cancellation must fail.”

[26] In the instant case it is important to note that cancellation relief and the deemed offer relief are based on different set of facts. The facts alleged for cancellation relate to the averments that SSC through Arendse has committed which according to RAL are in breach of the shareholders

agreement. As to the deemed offer, this relates to the fact that as a result of the alleged breaches of the shareholders agreement, SSC is deemed to have offered its entire shareholding in RMSA for sale to RAL.

[27] It is thus a principle in our law that claim for repudiation does not bar a later enforcement claim.¹⁸ In emphasizing this principle the Court in *Le Roux v Autovend (Pty) Ltd*¹⁹ said the following:

“...what the defendant has failed to appreciate is that the plaintiff is not seeking to rely on inconsistent remedies arising from the same set of facts but relies in the alternative on different remedies based upon different factual averments. (*See Glenn v Bickel 1928 TPD 186.*)”

In my view therefore, it is thus permissible to claim cancellation based on the repudiation facts and in the alternative, if that is not established, enforcement on the basis of the deemed offer facts. In such a case, there can be no question of RAL having “elected”, as argued by SSC and Arendse, to pursue an incompetent inconsistent remedy.

[28] Accordingly, it follows that there is thus nothing excipiable about the cancellation cause of action, as reflected in the proposed amended notice of motion. The deemed offer application, as shown above, was launched in November 2021. It was based on facts which unfolded during the course of April and October 2021. It was launched at a time when SSC and Arendse had not yet repudiated the agreement by failing to pay the purchase price. Subsequent to that application being launched, only on 1 January 2022, SSC repudiated the agreement by failing to pay the purchase price. RAL has made its stance clear – it considers the failure to pay the

¹⁸ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* (2) 2005 (6) SA 23 (C) at para 35.

¹⁹ 1981 (4) SA 890 (N) at 893A.

purchase price to be a repudiation and it accepts that repudiation. In no sense does it approbate and reprobate. However, it has also explained that it does not wish to take the law into its own hands and has accordingly sought this Court's intervention by way of leave to amend and of its interpretation of SSC's conduct. It is entirely logical, and certainly not contradictory, for RAL to take the stance that the agreement has been repudiated but that, if this Court disagrees, fall back on its deemed-offer application. This is why, in the amended notice of motion, the deemed offer relief is sought in the alternative to the cancellation relief.

[29] Furthermore, the alleged repudiation took place after the deemed offer claim and after the opposing affidavit had been filed by SSC and Arendse. There can therefore be no prejudice as alleged by SSC and Arendse. Either RAL is correct on the alleged deemed offer and if not, the shareholders agreement remains in place in which case an alternative relief will be sought. There cannot be any question of probating and abrogating as alleged by SSC and Arendse.

[30] It is in my view, in the interest of justice that the amendment should be permitted to ensure that all the issues between the parties are properly ventilated.

Order

[31] The following order is made:

- a. the applicant is granted leave to amend its notice of motion by including the relief contained in prayer 2 of the amended notice of motion attached to its notice in terms of Uniform Rule 28;

- b. the applicant shall deliver its amended notice of motion within five days of this order;
- c. the applicant is granted leave to deliver its supplementary affidavit dated 3 March 2022, simultaneously with its amended notice of motion;
- d. the first and third respondents shall pay the costs of the application jointly and severally, the one paying and the other to be absolved.

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ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 08 May 2024.

Appearances:

For the applicant: Adv J Blou

Adv A Friedman

Instructed by Cliffe Dekker Hofmeyer Inc

For the First and Third respondents: Adv AE Bham SC

Adv T Scott

Adv T Poee

Instructed by Werksmans Attorneys

Date of Hearing: 10 November 2023

Date of Judgment: 08 May 2024

