IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 11824/2022

In the matter between:

EBESA ARCHITECTS (PTY) LTD	**Applicant**

vs

CITY OF CAPE TOWN	**Respondent**

In re:

THE CITY OF CAPE TOWN	**Plaintiff**

and

EBESA ARCHITECTS (PTY) LTD	**First Defendant**
NARKER AND ASSOCIATES CC	**Second Defendant**
NEW CONSULTING ENGINEERS (PTY) LTD	**Third Defendant**
ALWYN LAUBSCHER AND ASSOCIATES (PTY) LTD	**Fourth Defendant**
ZINTATHU-M CONSTRUCTION SAFETY SERVICES t/a SPELLBOUND TRADING 119 CC	**Fifth Defendant**
BOSHARD CONSTRUCTION (PTY) LTD	**Sixth Defendant**

Matter Heard on: 7 August 2023
Judgment delivered: 1 September 2023

JUDGMENT

MANTAME J

Introduction

[1] This is the application for leave to amend the applicant's ("*first defendant*") plea. On 14 July 2022, the respondent ("*plaintiff / the City*") instituted an action for damages against the applicant and five (5) other defendants. A notice of bar was served by the respondent on 24 August 2022. On 5 September 2022, the applicant filed its special plea and conditional special plea. On 22 September 2022, the respondent filed its replication to the first defendant's special plea and conditional special plea, and on 02 November 2022 it delivered its notice to amend its particular of claim.

[2] There appears to be no objection raised by the applicant when the respondent amended its particulars of claim. On 25 November 2022 and / or 6 December 2022, the applicant proceeded with its notice of intention to amend its Conditional Special Plea and plea. On 9 December 2022, the respondent delivered its notice of objection to applicant's notice of intention to amend. On 19 January 2023, the applicant proceeded with its application for leave to amend its plea and conditional special plea which the respondent opposed on 30 March 2023. It is for these reasons that the matter served before this Court.

Background Facts

[3] The respondent sued the first to sixth defendants for damages suffered as a result of an alleged negligence. The action emanates from two (2) tenders; namely:

3.1 Tender number 269/2012/13 ("*the first tender*") awarded to a joint venture, namely Ebesa 372E JV ("*Ebesa JV*"); and

3.2 Tender number 267Q/2015/16 ("*the second tender*") awarded to Boshard Construction (Pty) Ltd ("*Boshard*").

[4] The applicant and five (5) other defendants are members of Ebesa JV who successfully tendered for the provision of professional services which had to be executed together with the service, in terms of the second tender. In respect of the first tender Ebesa JV was required to perform the following services:

4.1 the provision of architectural, civil, structural, electrical and mechanical engineering services, quantity surveying, acting as principal agent for the Employer (the City), safety services, environmental assessment and compliance monitoring, and related services.

4.2 responsibility for all professional services required to fulfil the City's objectives as advertised therein.

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[5] Ebesa JV was to perform its professional services in three (3) areas, i.e., North, South and East of the City during the three (3) year period commencing on 1 July 2013 until 30 June 2016 with an estimated value of R50 million (excluding VAT). The services in terms of the second tender had to be executed in *tandem* with the professional services awarded in terms of the first tender. The second tender was awarded to Boshard commencing on 1 June 2017 and ending on 12 June 2018. That did not materialise and the period was extended.

[6] In terms of the first tender Ebesa JV was responsible for the complete project and contract management. It was the respondent's assertion that the applicant and

other five (5) defendants breached some clauses in the agreement / joint venture agreement with regard to the two (2) tenders. As a result of the negligence, breach of contract and / or duty of care of the applicant and the other five (5) defendants in executing their duties, the respondent suffered damages by incurring fruitless and wasteful expenses in the aggregate sum of R6 308 053.17 (six million three hundred and eight thousand and fifty-three rand and seventeen cents) – (VAT included).

Application for Leave to Amend

[7] As stated above after an objection was raised by the respondent to the applicant's notice of amendment, the applicant filed an application for leave to amend.

7.1 In its application for leave to amend the applicant asked the Court to grant an order in the following terms:

7.1.1 By deleting the phrase "*failing which such a dispute would first be referred to either mediation or adjudication, and then to arbitration*" in paragraph 2 thereof and by replacing it with "*failing which such a dispute would be referred to mediation.*"

7.1.2 By deleting the phrase "*nor was the dispute ever referred to or determined by mediation, adjudication or arbitration*" in paragraph 3 thereof and replacing it with "*nor was the dispute ever referred to mediation.*"

7.1.3. By deleting the Prayer and by replacing it with "*<u>Wherefore the first defendant prays that</u> the action be stayed pending the referral to*

and finalisation of the mediation of any dispute relating to the plaintiff's claims."

7.2 That the applicant be granted leave to amend its Plea in the following manner:

7.2.1 By deleting paragraph 15 thereof and by replacing it with:

"*15. Other than to deny that the Services Contract was extended, the*

first defendant admits the allegations in these paragraphs."

7.2.2 By deleting paragraph 23 thereof and by replacing it with:

"*23. The first to fifth defendants, and not the JV, rendered services to the plaintiff in respect of the Works.*"

7.3 By deleting the phrase "*Alwyn Laubscher of*" where it appears in paragraph 24.

7.4 By deleting paragraphs 41 to 43 thereof and by replacing it with:

"*41. The first defendant admits that:*

41.1 The assembly of the video screen wall and the construction of the surrounding structure was originally designed and planned with 12 60-inch TV screens;

41.2 Without informing the first defendant or seeking its advice in that regard, 18 70-inch TV screens were acquired and utilized to assemble and construct the video screen wall; and

41.3 Due to the height of the raised floor and the height of the concrete beam at the top of the surrounding structure, the video screen wall was unsuitable and not operationally acceptable to the plaintiff due to a portion of such wall not being visible to operator.

42. The first defendant denies the allegations in this paragraph as same contradict or conflict with what is pleaded above.

43. In particular, the first defendant denies that its conduct or omissions gave rise to the complaints of the plaintiff or that it in any way breached any allegation it may have had to the plaintiff."

7.5 By deleting the words "*was negligent or*" where it appears in paragraph 44 thereof.

7.6 By inserting the phrase "*that it is liable for any delay or losses suffered by the plaintiff, if any*" between "*the plaintiff*" and "*the first defendant*" where it appears in the second line of paragraph 44 thereof.

7.7 By deleting paragraph 48 thereof and by replacing it with:

"*48. The completion of the Works was delayed by numerous factors such as, inter alia, the requisite building plans were not approved on time as the applications for rezoning, subdivision and consolidation of the*

properties on which the Works had to be performed was not timeously attended to, recorded or registered by the plaintiff."

7.8 By deleting paragraph 52 thereof and by replacing it with:

"*52. Secondly, any defects to or problems with the video screen wall, and any remedial work that had to be undertaken in that regard, were not occasioned by the conduct or omissions of the first defendant.*"

7.9 By deleting paragraph 56 thereof and by replacing it with:

"*56. Thirdly, any damages allegedly suffered by the plaintiff were not occasioned by the conduct or omissions of the first defendant.*"

[8] In raising its objection to paragraph 7.1.1 above, the respondent stated that Clause 12.2.4 (Part C1: Agreements and Contract Data clearly contained the words – Final settlement of dispute is by litigation, whereas Clause 12.1.2 states that the interim settlement of disputes is to be by mediation.)[1] The proposed amendment is incomplete and inconsistent with the wording of Clause 12.2.4 of the Contract Data. Such an amendment is impermissible to effect and would be prejudicial to the respondent.

[9] With regard to paragraph 7.1.2 above, it was stated that Clause 12.2.4 of the Contract Data contains the words, "or final settlement by litigation" after the word, 'mediation.' The proposed amendment is incomplete and inconsistent with the wording of Clause 12.2.4 of the Contract Data. It is therefore impermissible to effect an amendment which is prejudicial to the respondent.

[1] Record page 57

[10] In respect of paragraph 7.1.3, the respondent objected on the fact that there is no basis to amend the existing prayer. The existing prayer should remain since it specifically refers to a resolution of the plaintiff's claim in terms of Clause 12 of the Conditions which provides for final settlement by litigation as per Clause 12.2.4 of the Contract Data. The proposed amendment is prejudicial to the respondent since it seeks to circumvent the resolution of the matter by litigation, as expressly regulated in Clause 12.2.4 of the Contract Data.

[11] The respondent objected to the proposed amendment of the applicant's plea and stated that, paragraph 7.2.1 above, by the applicant seeks to withdraw an admission previously made, and that is prejudicial to the respondent. With regard to paragraph 7.2.2 above, the applicant has already identified Alwyn Laubscher as the party in the joint venture (JV) appointed as the principal agent in terms of the Works. The applicant, now seeks to retract that admission. The amendment sought is impermissible and therefore prejudicial to the respondent.

[12] In its objection to paragraph 7.4 above, the respondent stated that in paragraph 41 of its plea, the applicant has already identified either the sixth defendant, *alternatively*, the third defendant, *alternatively*, both of them, as the parties liable and now it seeks to retract this admission which is prejudicial to the respondent. In paragraph 42 of its plea, the applicant has admitted the allegations pleaded to and now seeks to withdraw its admission. The withdrawal of the admission is prejudicial to the respondent. In paragraph 43 of its plea, the applicant has already identified either the sixth defendant, *alternatively* the third defendant, *alternatively* both of them, as the

parties liable and now seeks to retract this admission which is prejudicial to the respondent.

[13] In so far as paragraph 7.5 above is concerned, the respondent, at the hearing of this matter pointed out that it does not oppose this proposed amendment.

[14] With regard to paragraph 7.6 above, the respondent pointed out that the applicant has already pleaded to this paragraph and save for the denial that it was negligent or breached any of its obligations and duties to the respondent, the remaining allegations were admitted. The applicant's attempts to further qualify this paragraph is impermissible and prejudicial to the respondent. In fact, the unamended paragraph 37 of the respondent's particulars of claim read exactly the same as its amended particulars of claim except for the word, 'negligence' and this does not constitute a basis for the applicant to amend.

[15] Regarding paragraph 7.7 above, the respondent pointed out that the applicant has already pleaded to this paragraph. However, it now seeks to amend in circumstances where the respondent has not amended its particulars of claim. The proposed amendment is prejudicial to the respondent.

[16] The respondent's objection to paragraph 7.8 was premised on the fact that paragraph 52 of the applicant's plea has already identified either the sixth defendant, *alternatively*, the third defendant, *alternatively,* both of them as the parties liable. However, it now seeks to retract this admission which is prejudicial to the respondent.

[17] Lastly, in relation to paragraph 7.9 above, the respondent stated that paragraph 56 of the applicant's plea, already identified either the sixth defendant, *alternatively*, the third respondent*, alternatively*, both of them as the parties liable and now the applicant seeks to retract this admission. That is prejudicial to the respondent.

[18] However, at the hearing of this application, the applicant indicated that it no longer seeks relief with regard to paragraph 7.4, 7.8 and 7.9 above.

Discussion

[19] The general approach to be adopted in application for amendment has been set out in numerous authorities. However, the Court in *Commercial Union Assurance Co Ltd v Waymark NO,*[2] has set out clearly in its headnote the principles governing applications for amendment of pleadings as follows:

19.1 The court has a discretion whether to grant or refuse an amendment;

19.2 An amendment cannot be granted for the mere asking; some explanation must be offered therefor;

19.3 The applicant must show prima facie the amendment 'has something deserving of consideration, a triable issue.'

19.4 The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties';

19.5 The party seeking the amendment must not be mala fide;

19.6 The amendment must not 'cause an injustice to the other side which cannot be compensated by costs;

[2] 1995 (2) SA 73 (TK)

19.7 The amendment should not be refused simply to punish the applicant for neglect.

19.8 A mere loss of (the opportunity of gaining) time is no reason, in itself, for refusing the application.

19.9 If the amendment is not sought timeously, some reason must be given for the delay.

[20] The applicant postulates that the respondent's objections to its proposed amendments are nonsensical as they are without merit. For instance, in their first proposed amendment, the applicant suggests that the settlement of their dispute should be by way of mediation. The respondent pointed out to the applicant that it cannot be, as resolution of disputes by way of mediation, is reserved for 'a settlement of interim disputes.' The dispute such as the one the applicant pleads to is final in nature, and therefore adjudication and / or litigation is the route to take.

[21] In addition, the respondent asserted that amendments are not simply there for the mere taking. A party seeking an amendment must make out a case therefore. The applicant has failed to do so. It will suffer irreparable prejudice should the amendments be granted.

[22] The applicant asserted that the respondent had repeated complaints that it will suffer prejudice. It has failed to explain before this Court how it would suffer such prejudice.

[23] The respondent stated that prejudice has been interpreted as "*the fact that an amendment may cause the other party to lose his case against the party seeking the amendment, is not in itself 'prejudice' of the sort which will dissuade the court from granting it.*" Thus, the fact that the effect of allowing an amendment to a plea might be to defeat the plaintiff's claim is not what is meant by 'prejudice' which cannot be remedied by an appropriate order of cost. There may, however, be cases where no terms would overcome the prejudice which the amendment would cause to the other party. For example, an amendment will not be allowed where it is applied for at such a late stage in the proceedings and not timeously raised to enable proper investigation and response thereto.[3]

[24] For instance, it was said, the applicant attempted to withdraw admissions without any explanation and therefore borders on *mala fide* conduct. The proposed amendments do not have as their purpose the facilitation of the proper ventilation of the issues between the parties. Should the proposed amendments be granted it would cause an injustice to the respondent which cannot be compensated by an award of costs and the parties will not be put back into the position in which they were when the pleading it is sought to be amended was filed. Even so, none of the proposed amendments are consequential upon the respondent having amended its particulars of claim.

Analysis

[25] It is trite that the granting or refusal of an application for the amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in light of all

[3] Van Loggerenberg, DE, Erasmus Superior Court Practice, Vol. 2 2nd Ed, at D1 - 334

the facts and circumstances before it.[4] An amendment will be held to cause injustice to the other side which cannot be compensated by costs if the parties cannot be put back for the purpose of justice in the same position as they were in when the pleading it is sought to amend was filed.[5]

[26] It is common cause that each case has to be determined on its own merits. The respondent submitted that this is a classical case where amendments, if granted would cause immeasurable prejudice and will result in an injustice. The *first* complaint by the respondent is that the applicant seeks to divert this matter to mediation proceedings, even though the dispute is not an interim one. A dispute would be interim in nature if the Works were still ongoing and / or continuing. In a situation where the Works have been finalised and the respondent now seeks to recoup its damages, it cannot be said that this matter should be directed to mediation. The applicant, by asking for those amendments, seeks to delay the dispute unnecessarily. The *second* complaint is that, the applicant has all but admitted liability and now seeks to resile therefrom. A party seeking to withdraw an admission ought to explain why it wishes to do so and if the other party has objected to them, it may only be withdrawn with the leave of the court.

[27] The applicant appears to downplay the seriousness of the consequences to be caused should the proposed amendments be granted. In fact, the applicant denies that it made some admissions in its previous plea. The applicant simply stated that it intended to make some rectifications in its plea.

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[4] Brocsand (Pty) Ltd v Tip Trans Resources & Others 2021(5) SA 457 (SCA) para 15 at 463A
[5] Moolman v Estate Moolman & Another 1927 CPD 27 at 29. South British Insurance Co Ltd v Glisson 1963 (1) 289 (D) at 295H; YB vs SB & Others NNO 2016 (1) SA 47 (WCC) para 10 at 51 A-B

[28] In fact, I agree with the respondent that what the applicant seeks to rectify, is in fact a withdrawal of admission. In *President – Versekeringsmaatskappy Bpk V Moodley*[6], Hiemstra J opined that "… *though the approach is the same, the withdrawal of an admission is usually more difficult to achieve because it involves a change of front which requires full explanation to convince the Court of the bona fides thereof and it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might for that reason have omitted to gather the necessary evidence.*"

[29] In any event, the applicant did not dispute the fact that none of the amendments are consequential upon the respondent having amended its particulars of claim. That is a clear indication that the applicant simply decided to change its tact on how it formulated its defences. The fact that there was no explanation on why these admissions were withdrawn demonstrates that the withdrawal of those admissions was *mala fide.* It does not assist the applicant to dispute that there was no withdrawal of admissions where clearly there is.

[30] If regard is to be had to the original particulars of claim and amended particulars of claim, the amendments were insignificant and a large portion of the original particulars of claim was left unaltered. In any event, the respondent denied that the applicant merely sought to rectify its plea. For instance, the applicant admitted liability on the part of the third, and the sixth respondents. According to the respondent that admission is dispositive of any defence to the respondent's action since on the applicant's version the third defendant (and therefore the JV) and the sixth defendant were the parties liable for the respondent's claim. If those proposed amendments were

[6] 1964 (4) SA 109 (T)

to be allowed to go through, that would cause great prejudice to the respondent. It was said that the admissions made by the applicant rendered it unnecessary for the City to prove admitted facts and to lead unnecessary evidence. As the applicant's plea is currently framed, there is no defence to the respondent's claim in light of the admissions made.

[31] With regard to the amendment of special plea and conditional special plea (paragraph 1 (1.1-1-3)). The respondent stated that the amendment sought is at odds with the wording of the Contract Data. The resolution of disputes is contained in the Contract Data and it does not only refer to "mediation." The applicant states that the interim settlement of disputes was to be by way of mediation. Since the date of practical completion of the contract was 17 July 2019, it is therefore common cause that the date for resolution by mediation referred to has passed. As mediation was no longer applicable, the only manner in which the City could recover its damages as recorded by Clause 12.2.4 on page 68 of the Contract Data, is by litigation. Further, had the matter proceeded to mediation, the respondent's claim may have become prescribed causing further prejudice to the respondents. The mediation narrative by the applicant is a dilatory tactic to avoid having to pay damages for as long as possible. The respondent was absolutely correct in its analysis of the applicant's behaviour towards its claim.

[32] In any event, the respondent's claim was not determinable at the time the Works were ongoing for submission of the same for mediation, adjudication and / or arbitration. It was correctly pointed out that the respondent's assessed loss could only be determined on practical completion of the contract. This contention, in my view has

merit as the final settlement of the dispute as contained in Clause 12.2.4 of the Contract Data, page 68 is by way of litigation. In my opinion, this amendment must fail.

[33] In so far as the amendment of paragraph 15 and 23 of the plea is concerned, that is paragraph 7.2 (7.2.1 and 7.2.2) above (paragraphs 2. 2.1-2.2), the applicant denies that the Services Contract was extended. However, the respondent submitted that the practical completion date was 17 July 2019. However, in its amended particulars of claim, paragraph 13 and 13.2, it stated that the applicant, in its first tender, it acknowledged that it would be responsible for all professional services required to fulfil the respondent's objectives as advertised therein. The termination clause made it clear that the applicant would only cease when "*all obligations and rights of the Joint Venture and the Members in connection with the Contract and the Agreement have ceased.*"

[34] The respondent stated that in its plea the applicant alleged that the third and sixth defendants are liable as per the stated reasons. This was an outright admission in the plea which it now seeks to qualify in circumstances where there is no basis to deny the extension of the services contract.

[35] This Court agrees that the applicant's amendment is tantamount to a withdrawal of an admission that was previously made in the plea. Even though the applicant seeks to argue that the extension of the contract was not previously pleaded in the particulars of claim, the respondent deemed it fit to amend its particulars of claim to include the extension of the Contract. Once more, it does not assist the applicant to state that the initial particulars of claim did not contain such allegation. The particulars of claim have

been amended without any objection from the applicant. What was required from the applicant, if it intended to withdraw the admission was to properly motivate and justify such withdrawal – See *Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd.*[7] In *President-Versekeringsmaatskappy Bpk v Moodley (supra)*[8] Hiemstra J held that a withdrawal requires full explanations 'to convince the Court of the *bona fides* thereof.'

[36] In my view, it does not suffice for the applicant to simply say it sought to rectify its plea of its inaccuracy or mistake. It appears that in making such submission, it should explain satisfactorily the basis of such inaccuracies and mistakes and the reasons of such withdrawal. In the absence of such full and / or satisfactory explanation, it follows that the amendment should fail.

[37] With regard to the proposed amendment in 7.3 above (paragraph 2.3), the respondent persisted that the factual position is that Alwyn Laubscher of the fourth defendant was appointed as the principal agent in respect of the Works. The applicant having pleaded so, now impermissibly seeks to retract this allegation without providing any reasons for doing so. The applicant, as a member of Ebesa JV, it must have knowledge of the identity of the principal agent. I agree with the respondent that no explanation as to why it was mistakenly pleaded that Alwyn Laubscher was appointed as the principal agent. Likewise, this amendment constitutes a withdrawal of an admission.

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[7] 1992 (1) SA 167 (C) at 170
[8] Ibid, Fn 6 at 110 H – 111 A

[38] The applicant advised that it did not persist with its application for amendment of paragraph 7.4, 7.8 and 7.9 above (paragraphs 2.4, 2.8, and 2.9), and as such it would not be necessary to deal with them.

[39] With regard to the proposed amendment in 7.5 above (paragraph 2.5), it appears that the respondent does not challenge this amendment. As such, I see no reason it could not be granted.

[40] In so far as the amendment in 7.6 and 7.7 above (paragraphs 2.6 and 2.7) relates to the withdrawal of admissions, regard should be had to my analysis at paragraphs 35 and 36 above. For these reasons, this amendment should fail.

[41] In *Amod v South African Mutual Fire and General Insurance Co Ltd,*[9] Leon J held that, 'the Court must also consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him, then the application to amend will be refused.

[42] The respondent submitted that if this Court would allow these amendments, then it would be put in a burden of proving facts which it would not otherwise have to do. That in itself would cause prejudice to the respondent. Prejudice in Oxford Dictionary refers to "harm or injury that results or may result from some action."

[43] In conclusion, the applicant did not explain fully why it sought the amendments in its application for amendment. Its assertion that it sought to rectify and / or correct its

[9] 1971 (2) SA 611 (N) at 614 H – 615 A

conditional special plea and plea is not satisfactory. Moreover, it sought to amend its pleadings in circumstances where the respondent did not amend its particulars of claim, in some portions where it seeks to amend its plea. Clearly, these proposed amendments constitute a change of tact after the applicant realised that there were no defences put forward in the original plea. The applicant cannot be permitted a second round of pleading where no explanation has been put forward. I therefore find no merit in the proposed amendments.

[44] In the result, I make the following order:

44.1 The amendment in paragraphs 1 (1.1 – 1.3) of Conditional Special Plea is refused.

44.2 The amendment in paragraphs 2 (2.1 – 2.3) of the Plea is refused.

44.3 The amendment in paragraphs 2.4, 2.8 and 2.9 was abandoned by the applicant. The plea in these paragraphs will remain in its original form.

44.4 The amendment in paragraph 2.5 is granted.

44.5 The amendment in paragraphs 2.6 and 2.7 is refused.

44.6 To the extent that the applicant succeeded in one prayer and the rest were refused, it should ordinarily bear the costs of this application. The applicant is ordered to pay the respondent's costs.

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MANTAME J

WESTERN CAPE HIGH COURT