



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 496/05

NOT REPORTABLE
In the matter between:

**THABAKHOLO LANDSCAPING (PTY) LTD
APPLICANT**

v

HYDROMULCH (PTY)

**FIRST
RESPONDENT**

NOFFPROP PROPERTY INVESTMENTS

**(PTY) LTD
SECOND RESPONDENT**

Coram: Navsa, Conradie JJA, Cachalia AJA

Heard: 16 November 2006

Delivered: 30 November 2006

Summary: Where an exception to a pleading is taken on the basis that the pleading discloses no cause of action, the exception will not succeed unless no cause of action is disclosed on all reasonable constructions of the pleading in question.

Neutral citation: This case may be cited as *Thabakholo Landscaping v Hydromulch* [2006] SCA 152 (RSA)

JUDGMENT

CACHALIA AJA

[1] This is an application for leave to appeal against an order of the Pretoria High Court (Legodi J) upholding the respondents' objection to the applicant's proposed amendment of its counterclaim, leave having been refused by that court. It comes before us by a direction of this court, in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959, that the application for leave to appeal is referred to oral argument and that the parties be prepared, if called upon to do so, to address this court on the merits.

[2] The respondents issued summons against the applicant in which they claimed inter alia payment of the sum of R204 693,69. The claim arises from an agreement, annexure 'A', attached to the particulars of claim. The applicant then filed a plea and counterclaim to which the respondents gave notice in terms of Rule 23(1) of their intention to except. When the applicant failed to respond to the notice, the respondents filed an exception to the applicant's plea and counterclaim. As a result the applicant notified the respondents of its intention to amend the plea and counterclaim. The respondents then gave notice in terms of Rule 28(3) objecting to the proposed amendment. In response the applicant launched an application in terms of Rule 28(4) for its plea and counterclaim to be amended. The respondents successfully opposed the application in the court below – hence the present proceedings.

[3] It was not clear from the papers or from the judgment of the court below whether the respondents' objection related both to the plea and the counterclaim, or only the counterclaim. It was agreed before us that there was in fact no objection to the plea.

[4] The respondents contend in this court, as they did in the court below, that the proposed amendment would render the counterclaim excipiable for lack of a cause of action. This, so they contended, was because the proposed counterclaim relies upon another agreement, annexure 'B', which predates annexure 'A', and because any claims based on the former were expressly excluded by the latter.

[5] Before I deal with this contention it is important to point out that the applicant's proposed amendment sought to introduce seven separate and distinct claims against the first respondent (no relief is sought against the second respondent). These were:

5.1 A claim for an order compelling first respondent to comply with its obligations in terms of clause 4.5 of annexure "A".

5.2 A claim for an order compelling first respondent to comply with its obligations in terms of clause 15.1 of annexure "A".

5.3 A claim for an order compelling first respondent to comply with its obligations in terms of clause 15.4 of annexure "A".

5.4 A claim for payment of the amount of R150 773,59 arising from clause 9 of annexure "A".

5.5 A claim for payment of the amount of R14 919 019.92 arising from annexure "A". This was disputed by respondents.

5.6 An alternative claim for payment of the amount of R14 919 019.92 is based on an alleged wrongful and intentional appropriation of the amount of R14 919 019.92 by first respondent.

5.7 A claim for a declaratory order that applicant is not indebted to first respondent in the amount of R849 535.00 as reflected in the financial statement furnished by first respondent to applicant.'

[6] Of the seven claims, only that referred to in para 5.5 arguably, arises from annexure 'B'. The court below did not deal with each of the seven claims separately, as it should have done. The court also appears to have confused annexure B to the particulars of claim, with annexure 'B' to the proposed amended counterclaim. Annexure B to the particulars of claim is the document which sets out the calculation of the amount

claimed in the summons. Annexure ‘B’ to the counterclaim is the contract which predates annexure ‘A’. This confusion led the court to conclude, erroneously, that the claim for R150 773.59 was excluded by annexure ‘A’.

[7] It follows that the court below erred in upholding the objection to the counterclaim in so far as it relates to 5.1, 5.2, 5.3, 5.4, 5.6 and 5.7. I turn to deal with the main issue in this appeal, whether the remaining part of the proposed counterclaim would, if allowed, be excipiable because it purports to introduce a claim that is excluded expressly by the terms of annexure ‘A’. This objection relates only to para 5.5, the claim for payment of the amount of R14 919 019.92.

[8] The clauses in annexure ‘A’, which the respondents rely on are:

‘3.4.1 In the last clause of the preamble thereof:

“AND WHEREAS there is in existence agreements between HYDROMULCH, THABAKHOLO and NYATHI, the parties have agreed that by their signature hereto, **such agreements will be cancelled and be of no further force and effect.**” (My emphasis.)

3.4.2 In clause 17 thereof:

“17. WAIVER/CLAIMS

17.1 . . .

17.2 Save for what is contained herein, the parties to this agreement will have **no further claims** one against the other in respect of any association, employment, rights, damages or from whatsoever other cause arising, [unless] same is contained in this agreement.” (My emphasis.)

[9] It is common cause that annexure ‘B’ predates annexure ‘A’ and that it is one of the agreements referred to in the last clause of the

preamble. The applicant contends that its accrued rights arising from annexure 'B' were not extinguished by the above clauses.

[10] I do not intend to embark on an analysis of either contract. This is because I think that the construction the applicant places on annexure 'A' is at least arguable. It is trite that an exception will not succeed unless no cause of action is disclosed on all reasonable constructions of the pleading in question. That being so, I think it would have been prudent for the court below to allow the exception to stand over for decision at the trial of the matter.

[11] It follows that the appeal must succeed. I make the following order:

- (i) The applicant is granted leave to appeal.
- (ii) The appeal is upheld.
- (iii) The respondents are jointly and severally ordered to pay the costs of the application for leave to appeal and also the costs of the appeal.
- (iv) The order of the court below is set aside and replaced with the following order:

The defendant's plea and counterclaim in the above matter is amended in the respects set out in defendant's notice of amendment of its plea and counterclaim dated 10 February 2005;

The defendant is ordered to pay the costs of the application for amendment in terms of Rule 28(4) on the basis of an unopposed application, but the plaintiffs, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs occasioned by their opposition to the application for amendment.

**A CACHALIA
ACTING JUDGE OF APPEAL**

CONCUR:

**NAVSA JA
CONRADIE JA**