

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG  
(REPUBLIC OF SOUTH AFRICA)**

**CASE NO: 03/03539**

**DATE:26/10/2011**

In the matter between:

<b>TECMED (PTY) LIMITED</b>	First Defendant/First Applicant
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<b><u>MILFORD, MICHAEL VOI HARRY</u></b>	Second Defendant/Second Applicant
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<b><u>BEGERE, WERNER</u></b>	Third Defendant/Third Applicant
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<b><u>HURWITZ, BARNEY</u></b>	Fourth Defendant/Fourth Applicant
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<b><u>PULE, ADRIEN</u></b>	Fifth Defendant/Fifth Applicant
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and

<b>SOJITZ CORPORATION</b>	Plaintiff/Respondent
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**JUDGMENT**

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**WEINER J:**

**BACKGROUND**

1. This Matter has a long and drawn out history, accompanied by long delays. The transactions between the parties last occurred in March 2000. Summons was issued three years later in 2003. Since then there have been amendments, substitution of parties, appeals and several postponements of the trial.

2. The present notice of amendment was delivered approximately three weeks before the matter was set down for hearing. The plaintiff agreed to the postponement of the trial. A new trial date has not yet been allocated.
3. The defendants seek to delete the plea and counterclaims and substitute them with two new special pleas, an amended plea and conditional counterclaims.
4. The applicant in the present matter are the defendants in the main matter . For ease of reference, the applicants will be referred to as the ‘defendants’ and the respondent as the ‘plaintiff’.
5. The plaintiff objected to these amendments. The main grounds of objection are that:
  - 5.1 the defendants have not made out a case in its founding affidavit to justify the delay in bringing the amendments;
  - 5.2 the defendants have not set out facts to show that the amendments introduce triable issues – as that term is understood in the context of the amendments to the pleadings;
  - 5.3 the amendments sought would render the pleadings vague and embarrassing and/or would fall short of the requirements of Uniform Rule 18(4) causing prejudice to the plaintiff;
  - 5.4 the defendants are attempting to springboard claims; and
  - 5.5 many, if not all of the counterclaims have prescribed.
6. The plaintiff submits that the main effects of the amendment are:

- 6.1 to withdraw admissions previously made in pleadings;
- 6.2 to introduce reliance upon an oral amendment to a written distributorship agreement, which has never before been relied upon or even referred to as a source of the defendants' rights;
- 6.3 to introduce counterclaims in respect of alleged defects in the goods sold and delivered by the plaintiff more than 10 years ago that have never before been relied upon; and
- 6.4 to introduce counterclaims that have become extinguished by prescription.

#### **ORIGINAL PLEADINGS AND EVENTS TO DATE**

- 7. This action was instituted during February 2003. The plaintiff seeks payment for goods sold and delivered. The amount claimed is USD 3,606,449.45 (currently equivalent to approximately R26,5 million), plus interest and costs.
- 8. The action concerns a number of transactions entered into pursuant to a written distributorship agreement concluded between the plaintiff and first defendant on 18 February 1992 ("the distributorship agreement").
- 9. After preparing a detailed affidavit resisting summary judgment, the defendants delivered their plea and counterclaim during October 2003.
- 10. In the original plea, the defendants admitted the conclusion and express terms of the distribution agreement and the transactions entered into pursuant to the distribution agreement. The defences raised were that payments were made for the goods and/or that the goods were defective. In respect of the latter, the defendants

relied on the Toshiba written warranty against defects in design material and workmanship ('the warranty').

11. Relying on this warranty, the defendants pleaded that:

11.1 the plaintiff failed to deliver eight identified items free from defects in design, material or workmanship;

11.2 despite proper notice these defective products were not repaired or replaced; and

11.3 the items were returned, *alternatively*, are tendered for return.

12. The first defendant simultaneously instituted a number of counterclaims for damages that are based on alleged breaches of the warranty.

13. In the plaintiff's plea to the counterclaims, it admits that the warranty applied to the products in terms of the distribution agreement. It relies on the express provision that the warranty would only be applicable if:

13.1 the first defendant gave the plaintiff written notice of any defect; and

13.2 satisfactory proof thereof promptly upon discovery of such defect, but in no case later than 15 days after expiration of the applicable warranty period.

14. The defendants submit that they have, at all times, been *bona fide*, that the prejudice (if any), complained of by the plaintiff, is not of the kind considered sufficient to refuse leave to amend, that prescription (despite being denied) is an

issue to be determined at trial and not in the present application, that its proposed amendment is not vague and embarrassing, that the proposed plea constitutes an expanded defence (i.e. a ‘technical correction’) and that the amended counterclaims relate to causes of action already before this court.

15. It lies within the court’s discretion, exercised judicially, to grant or refuse an amendment.<sup>1</sup> However, a defendant for an amendment must show:

15.1 the application is *bona fide*;

15.2 it introduces a triable issue; and

15.3 that there is no prejudice to the plaintiff, **alternatively**, the prejudice is not such that cannot be remedied by an order for costs or postponement.

16. In *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another*,<sup>2</sup> which has been referred to with approval in a number of cases<sup>3</sup>, Caney J said:

*“Having already made his case in his pleading, if he wishes to change or to add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable...or deliberately refrain until a late stage from*

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<sup>1</sup> See *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en ‘n Andere* 2002 (2) SA 447 (SCA) at 462 para 33

<sup>2</sup> 1967(3) SA 632 (D) at 641A-B

<sup>3</sup> Including *Ciba-Geigy (supra)*, *Caxton Limited and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565G

*bringing forward his amendment with the purpose of catching his opponent unawares,...or of obtaining a tactical advantage...or of avoiding a special order as to costs (own emphasis).”*

17. The defendant contends that:

17.1 its original plea, dated 28 October 2003, does not reflect the correct factual matrix.

17.2 it was only during trial preparation in 2010 that the inadequacy of the plea and counterclaims was ascertained.

17.3 it seeks to introduce the following:

17.3.1 the first special plea deals with the requirement for Japanese and United States of America Governmental Approval, which was a suspensive condition of each individual contract. Such approvals are alleged to be lacking; and

17.3.2 the second special plea deals with the fact that the first defendant did not confirm individual orders in writing, as was required by the distributorship agreement and that, therefore, the individual contracts are of no force and/or effect.

17.3.3 allegations that change the procedure for warranty claims created by the express provisions of the distributorship agreement, read with the warranty (the amended procedure). Defendant seeks to introduce an oral agreement (the oral agreement). The amended procedure was allegedly agreed upon orally ‘during the term of the of the [written distribution

*agreement] and more particularly during the period of 1997 to 1999 and at Johannesburg, South Africa and/or Tokyo, Japan.’*

18. The plaintiff denies that the amendment to introduce the oral agreement provides a ‘triable issue’, by virtue of the allegation that it is inconsistent with article 37 of the distributorship agreement.
19. Article 37.2, upon which the plaintiff relies, reads: “*No amendments, modifications, changes, alterations or supplements to this Agreement and executed by duly authorised representatives or officers of the parties hereto.*” Defendant contends that this is meaningless. Plaintiff sought to argue that the clause is clearly missing certain words (“unless reduced to writing and signed” between the words “Agreement” and “and executed”) and that such words should be included to give the clause its clear meaning. Defendant contends that these words cannot simply be read into the agreement and that therefore that oral variations are not precluded and the distributorship agreement should be read, as varied by the oral agreement.
20. Defendant contends that if this ‘oral agreement’ is proved, by means of evidence at trial, it will establish that the plaintiff failed to fulfill its warranty obligations and that it cannot hide behind the fact that the first defendant did not always make its grievances known in writing. It is, therefore, ‘*viable or relevant*’ and a *triable issue*.
21. The granting of this amendment affects the majority of the other amendments as they are based upon this oral agreement and amended procedure.

22. The defendants seek further to introduce implied contractual terms and defences which affect the defendant's indebtedness. These terms are, *inter alia*, that the products delivered would accord with the orders, would be functional and free of defects. The defences are, *inter alia*, that the plaintiff failed to credit the defendants for payments made.
23. Finally, defendants submits that the proposed amendments seeks to clarify the factual circumstances relating to the conditional counterclaims. It contends that the basis for the counterclaims has been set out in terms of the original 28 October 2003 document.

#### **THE SPECIFIC OBJECTIONS TO THE AMENDMENTS**

24. The introduction of the special pleas and their incorporation in paragraph 5, 8.1, 8.9, 9.1 and 10.1 of the plea:
- 24.1 Defendant contends that the allegations in the amendments refer directly to the provisions of the distributorship agreement.
- 24.2 There is merit in defendant's argument. There is no prejudice to plaintiff by the introduction of these allegations.
25. The plaintiff has taken issue with the fact that the defendants, in denying knowledge of the plaintiff's name and particulars have withdrawn the admission to this effect contained in the original plea.
- 25.1 The defendants submit that they have adequately explained this alleged withdrawal:



25.2 when action was instituted, it was by Nissho Iwai Corporation as the plaintiff;

25.3 the first defendant had contractual relations with and, accordingly, was able to admit the citation and description thereof;

25.4 Sojitz Corporation has been substituted for Nissho Iwai Corporation, for the very reason that Nissho Iwai Corporation has ceased to exist;

25.5 Sojitz Corporation has never traded as Nissho Iwai Corporation (they are distinct juristic entities), nor has it ever had a contractual relationship with the first defendant that would allow an admission of the particulars pleaded;

25.6 accordingly, the defendants are not withdrawing an admission in relation to the present plaintiff but only in relation to the former plaintiff, whose particulars are no longer reflected on the pleadings and to whose particulars the admission related; and

25.7 if correct, the present plaintiff will easily prove its particulars and will, accordingly, suffer no prejudice from the withdrawal of the alleged admission.

26. The plaintiff also takes issue with an alleged withdrawal of an admission in relation to the order and supply of products in paragraph 5 of the original plea. Defendant contends that, whilst goods were ordered and delivered (i.e. the admission still stands), same has been qualified with the allegation that certain

delivered goods did not constitute what was ordered, which, in turn, constitutes a defence to the alleged liability of the defendants and which is a matter to be determined at trial.

27. The attempt to introduce the so-called '*oral variation agreement*' in paragraphs 8.6 – 8.7 and 10.2 of the plea:

27.1 This amendment is challenged by plaintiff on the following grounds:

27.1.1 it does not raise a triable issue according to the plaintiff.

27.1.2 the provisions of article 37 properly interpreted permit no doubt as to the prohibition in article 37.2 against oral amendments of the distribution agreement.

27.1.3 there is insufficient particularity as to exactly when the oral variation was concluded to enable the plaintiff to plead thereto.

27.2 **Bergere**, the third defendant and a director of the first defendant states that during trial preparations in 2010, additional documents were located that with the information gleaned during consultations made it clear that the pleadings did not reflect the factual situation that forms the subject matter of the dispute, and that the same required amendment.

27.3 The plaintiffs argue that this is palpably false if one considers the defendants' detailed affidavit resisting summary judgment

deposed to in 2003. Plaintiff argues that the suggestions that further documents were discovered in 2010 and that new defences and counterclaims came to light thereafter should be rejected. Furthermore, Bergere's absence abroad when the discovery affidavit was signed (in 2010) is no explanation for seeking to amend a version that was pleaded in 2003.

27.4 The plaintiff submitted further that defendants have not shown that they have something deserving of consideration. The reasons for the amendment are vague in the extreme, particularly when one considers that:

27.4.1 the documents that were allegedly discovered are not identified;

27.4.2 there is no proper explanation *why* such documents give rise to further defences and/or counterclaims;

27.4.3 there is no detail of the alleged witness interviews that gave rise to the further defences and/or counterclaims; and

27.4.4 there is no detail of the proposed evidence that will be introduced to support the amended version relating to the alleged oral variation agreement.

27.4.5 It is inconceivable that the oral variation agreement concerning litigation of this magnitude was only discovered more than a decade later through the perusal of documents and trial preparations.

27.4.6 The prejudice created by the proposed amendment will be enormous.

27.4.7 Such amendments, if granted, will give rise to requests for discovery of documents relating to transactions which occurred more than 10 years ago. To the extent that such documents still exist, conducting a search will be extremely time consuming and costly.

27.4.8 Witnesses become unavailable and documents are destroyed after a certain period of time.

27.5 Defendants have countered this by submitting that:

27.5.1 it does not suffice to suggest, as the plaintiff does, that “[w]itnesses become unavailable and documents are destroyed after a certain period of time”, in light of the fact that such documents would relate to causes of action in terms of the original papers. The amendments relate to the exact transactions contained in the original plea. The same documents already discovered would therefore be relevant;

27.5.2 to the extent that the plaintiff may have to expend resources on locating relevant documents, such is a case that the plaintiff is not barred from making claims to the Taxing Master;

27.5.3 addressing the point that witnesses may (not have) become unavailable, the defendant repeats the point that they are dealing with the same witnesses (that are required to prove

facts on the original pleadings) and that the plaintiff has not actually alleged that such witnesses are, in fact, unavailable;

27.5.4 prejudice should be proved: not alleged on a speculative basis.

28. In regard to the alleged new defects and additional payments raised in paragraphs 9.3 to 9.6 and 10.1 of the plea, plaintiff states that these alleged defects and credit payments are used by the defendants as a springboard for the new counterclaims (that have prescribed).

### **AD THE CONDITIONAL COUNTERCLAIMS**

#### **Ad the conditional counterclaims generally**

29. The plaintiff:
- 29.1 relies on the non-variation clause in distribution agreement properly interpreted. This relates to both the procedure and the implied or tacit terms which defendant seeks to introduce.
  - 29.2 contends that the defendant's proposed amendments are vague and embarrassing, and do not comply with rule 18(4), because the defendants have failed to state the date of shipment from which the warranty would run and which of the equipment is alleged to be defective .
  - 29.3 contends that the defendants propose to withdraw a reference to a specific date in several of the amended paragraphs and replace same with a vague reference ('in and during the period 1999 to 2000' or ' in 2000'). Plaintiff submits that this does not comply

with rule 18(4) in that the amendment would render the counterclaim vague and embarrassing.

30. Generally, the plaintiff's complaints are that the defendants seek to introduce damages claims that have not previously been raised. Given the considerable lapse of time, plaintiff submits that the defendants are required to give full particulars regarding these damages claims. Their failure to do so renders the particulars vague and embarrassing, and suggests there is no triable issue. Plaintiff counters this by submitting that if this amendment is granted and the Plaintiff is required to plead to it, it is permitted, thereafter, to request further particulars for the purposes of trial.

31. Plaintiff also submits that several of the damages claims have prescribed.

31.1 Defendant submits that this is not an issue for an interlocutory Court<sup>4</sup> and that no new claims are, in any event, being introduced. Prescription should be raised by means of a special plea, in the trial action.<sup>5</sup>

31.2 Defendant submits that there are issues that may defeat a plea of prescription, which the defendants may wish to raise in reply, such as, *inter alia*, the English Limitations Act of 1980 (as the contract is to be interpreted according to English Law) and the applicability of the Prescription Act 68 of 1969, which, again, is an issue that is for a trial court to decide.

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<sup>4</sup> *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA).

<sup>5</sup> *Ibid.*

32. The plaintiff claims prejudice in opposing the amendment as a further delay has occurred. That basis of opposition is not relevant at this juncture. No trial date has yet been allocated. The amendments and consequential pleadings can be filed prior to the new trial date which will be allocated. This basis of opposition could rather have been raised by the plaintiff when opposing the postponement which the defendant sought in order to amend its pleadings.
33. The delay in seeking these amendments is taken into account as well as the explanation tendered by the defendant. It is an established principle, that a refusal of an amendment should not be used to punish a defendant<sup>6</sup>.
34. In addition, the delay is not fatal to the application, if adequately explained.

*“.....delay, however protracted, is not in itself a bar to the amendment of a pleading provided that it is satisfactorily explained, that there is good faith, and that there is no prejudice which cannot be compensated for by a postponement and appropriate order for costs.”<sup>7</sup>*

## **CONCLUSION**

35. Without obtaining rectification of Clause 37 of the distributorship agreement, the plaintiff is unable to claim that same contains a valid non-variation clause. Defendants' amendment in relation to the oral agreement, although arising very late in the proceedings, does therefore raise a triable issue.
36. The amendments which follow upon this are accordingly also triable issues;

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<sup>6</sup> *Commercial Union Insurance Co Ltd v Waymark NO 1995 (2) SA 73 (TK) at 77B (Authorities Bundle, page 295).*

<sup>7</sup> *GMF Kontrakteurs (EDMS) Bpk v Pretoria City Council 1978 (2) SA 219 (T) at 224G-H (Authorities Bundle, page 158).*

37. If particulars are vague and embarrassing, the plaintiff can seek further particulars;
38. The conditional counterclaims are based upon the supply of the same goods referred to in the original pleadings;
39. The issue of prescription should be dealt with by the trial court;
40. The implied and/or tacit terms are not so unlikely in a contract as to be excluded;
41. The balance of the amendments relate to factual issues which the defendant will in due course have to prove.
42. It is not for this court to pronounce on the probability of such defences and counterclaims being factually correct. This court only has to take into account:
  - 42.1 Explanation for the delay;
  - 42.2 Whether there are triable issues;
  - 42.3 Can the plaintiff's prejudice be dealt with by an order for costs.
43. The defendant has provided an explanation for the delay; the amendments do contain triable issues and the plaintiff's prejudice can be cured by a costs order. The plaintiff's opposition has however been reasonable and is not frivolous.
44. In the result, the following order is granted:
  - 44.1 The defendants are granted leave to amend their plea and the first defendant's counterclaims as set out in the Notice of Intention to Amend dated 7 February 2011.



44.2 the defendants are ordered to pay the plaintiff's costs of this application, jointly and severally, the one paying the others to be absolved.

DATED AT JOHANNESBURG THIS 26th DAY OF OCTOBER 2011

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**Weiner J**

Date of hearing: 20 September 2011

Date of judgment: 26 October 2011

Counsel for the plaintiff: SW Burger

Attorneys for the plaintiff: Bowman Gilfillan

Counsel for the defendant: M Nowitz and D Mahon

Attorneys for the defendant: Schindlers Attorneys