IN THE HIGH COURT OF SOUTH AFRICA

{EASTERN CAPE DIVISION, GRAHAMSTOWN}

Case no. 685/2018

In the matter between:

DALE HUNTER HORWARTH Plaintiff

And

FARGOWORX. INVESTMENTS (PTY) LTD First Respondent

KEVIN VAUGHN FILEN Second Respondent

JUDGMENT

TONI AJ

Introduction

[1] Plaintiff seeks leave to amend its particulars of claim. It is common cause that plaintiff and defendants concluded various agreements with each other which created certain legal obligations between them. The first of these agreements is an agreement of lease in terms whereof the plaintiff leased to the first defendant its immovable property commonly described as [….] Port Elizabeth. The second agreement relates to the sale of the same property. The third is a Deed of Suretyship in terms whereof the second defendant bound himself as surety and co-principal debtor with the first defendant for the due performance of the latter's rental and related obligations in respect of the same property.

[2] In due course the grapes became sour and the parties became embroiled in a legal dispute that is before this court for determination. Plaintiff instituted summons against defendants claiming payment of certain sums of money allegedly due to it by defendants. The summons is combined with particulars of claim in which plaintiff sets out broadly the basis of his claim and the relief sought.

[3] Having been served with a notice to amend the summons, the defendants filed a notice of objection to the proposed amendment. It is not my intention to deal exhaustively or in any detail with the merits of plaintiff's claim against the defendants save to mention that it is defendants' objection to the contemplated amendment that is a bone of contention in these proceedings, the issue falling to be determined being whether or not plaintiff should be granted leave to amend its summons.

[4] Amendment of pleadings in our law has always been a contested terrain. It has always been a constant strife between two competing rights[1], namely; a right for one party to amend its pleadings on the one side, where such amendment is not *mala fides*, and a right by the other party to object to the amendment on the other, where such amendment has a potential to prejudice that other party. In the centre of the storm is the court's discretion to allow or refuse the amendment which epitomises the courts' desire to have the dispute between the two adversaries settled so that justice between man and man is not only done but is manifestly and undoubtedly seen to be done.

[5] As aptly stated by the court in *Cross v Ferreira*[2], the primary object of allowing amendment is "to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done". The dispute between the two contestants can only come to an end if wanton skirmishes are eliminated and all triable issues are properly ventilated before an appropriate forum.

[6] The above should be contrasted with the court's inclination to disallow the amendment if such is not made in good faith or [it] is done with the sole purpose of prejudicing the defendant or in cases where obvious injustice to the other party (the

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[1] This reminds me of the noteworthy words of one eminent Greek philosopher, Anaximander, who once said, "Life is a constant strife between two opposites, i.e, day and night, hot and cold, summer and winter…"

[2] 1950 (3) SA 443 (CPD) at 447

defendant) would result if the amendment is allowed. Its proponents will always want to convince the court that the quest for it is well merited whilst its naysayers will always attempt to dislodge the seekers on the ground that the amendment is not well suited.

Plaintiff's quest for amendment

[7] Plaintiff has contextualised its proposed amendments in its heads of argument as follows:

> *(a)* "*Inserts reference to the lease agreement originally concluded between the Plaintiff and First Defendant on 30 November 2013 as appearing on paragraph 4 to 6 of the notice of intention to amend.*
>
> *(b)* *Shifts paragraph 16 in the unamended particulars of claim to paragraph 5 in the amended particulars of claim, the wording of these paragraphs being identical.*
>
> *(c)* *Paragraphs 7 to 17 of the plaintiff's amended particulars of claim reiterate that which was pleaded in paragraph 4 to 11 and 13 to 15 of the plaintiff's unamended particulars of claim and contain averments relating to the various sale agreements concluded between the plaintiff and first defendant and the failure of the defendant to fulfil suspensive conditions contained therein. These paragraphs are pleaded in substantially the same terms in both the amended and unamended particulars of claim.*
>
> *(d)* *The averment to the effect that there was a tacit term of the agreement, as contained in paragraph 12 and 18 of the plaintiff's unamended particulars of claim, is deleted as is pleading consequent thereto dealing with the first defendant's indebtedness to the plaintiff on the basis of the tacit term.*
>
> *(e)* *The claim in the alternative as set out in the unamended particulars of claim is described as the "FIRST CLAIM" in the amended particulars of claim, with the result that paragraphs 18 – 24 in the amended*

particulars of claim are, in so far as the substance thereof is concerned, identical to paragraph 19 in the unamended particulars of claim.

(f) The claim pleaded against the second defendant appearing in paragraph 25 – 27 of the amended particulars of claim is, in substance identical to the claim pleaded in paragraph 20 – 22 of the unamended particulars of claim.

(g) The plaintiff has added a claim headed "SECOND CLAIM" in paragraphs 28 – 35 of the amended particulars of claim in which he claims damages for the first defendant's breach of an agreement reached pursuant to eviction proceedings having been launched by the plaintiff. This agreement is simply pleaded in greater detail as to its terms than that which was set out in paragraph 17 of the unamended particulars of claim."

The end result of the proposed amendment is the constitution of three claims under enrichment action, suretyship agreement and breach of an agreement reached pursuant to eviction proceedings, so concludes the plaintiff.

[8] Ms Beard, for the plaintiff, argued at the hearing that the defendants' objection has no merit as the paragraphs sought to be amended are identical and substantially look the same as the amending paragraphs. She referred the court to various authorities in support of the plaintiff's quest for amendment.

Defendant's objection

[9] Defendants' objection to the proposed amendment is three pronged. The first ground of objection is that plaintiff has not specifically pleaded the various *conditiones* founding the enrichment action. The second objection relates to the deed of suretyship. In this regard defendants aver that the amended particulars of claim, in so far as plaintiff's claim relates to second defendant, based on suretyship, are at odds with the terms of the suretyship agreement. The third ground of objection is that the quantification of plaintiff's claim against second defendant fails to meet the requirements of Rule 18. The amendments are therefore excipiable on the grounds

that they are vague and embarrassing with the third ground upon which the objection is based being that it is both excipiable and an irregular step.

[10] Mr Williams argued on behalf of defendants that on the above grounds, the amendment should be refused. Mr Williams also referred the court to authorities in support of defendants' contention.

The Law

[11] Amendment of pleadings in the High court is regulated by Rule 28 of the Uniform Rules of court which allows amendment of pleadings where there is no objection to the proposed amendment. However, where a proper objection has been noted, the party seeking amendment should approach the court for a leave to amend. The Court's approach in dealing with amendments has always been that an application for amendment should be allowed unless the application to amend is *mala fide*. A *locus classicus* for amendment of pleadings is found in *Moolman v Estate Moolman*[3] where the court said:

> "..... The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs or in other words 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."

[12] The court has a discretion to grant or refuse the amendment which must be exercised judicially. The court is inclined to grant the amendment where it is made in good faith. For the court to exercise its discretion in favour of granting the amendment, the seeker must demonstrate a measure of good faith. The idea is to avoid a situation where if it is refused the same parties will be brought before the

[3] *1927 CPD 27 at 29; See also Four Tower Investments (Pty) Ltd v Andres Motors 2005(3) SA 39 (NPD) at par 15;*

same court again for determination of the same issue. In *Trans-Drakensburg Bank Ltd v Combined Engineering (Pty) Ltd*[4], the court held:

> "The amendment must be bona fide and if it is, it will be granted, especially where the effect of refusing it would again bring the same parties before the same court on the same issue"

[13] To persuade the court to exercise its discretion in its favour, the quester must demonstrate that the proposed amendment is worthy of consideration and introduces a triable issue. The court must then weigh the reasons or explanation given by the quester for the amendment against the objections raised by the opponent and where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused. In *Trans-Drakensburg Bank*[5] case *supra* the court said:

> "Having already made his case in his pleadings, if he wishes to change or 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 record an issue of which he has no supporting evidence where evidence requires or save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

[14] If an amendment will result in a pleading being excipiable, such an amendment shall not be allowed. However, in exercising its discretion the court must adopt an approach that is not over-technical. It has always been said that an exception may only be allowed if it strikes at the root of the cause of action. In *Telemetric v Advertising Standards Authority South Africa*[6] it was held:

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[4] *1967(3) SA 632(D) at 640 H*
[5] *At 641*
[6] *2006 (1) SA 461 (SCA)*

> "Exceptions should be dealt with sensibly. They provide a useful mechanism, to weed out cases without legal merit. An over-technical approach destroys their utility.

[15] The issue is whether the present case is without any merit but for the amendment. Ms Beard has argued that the paragraphs sought to be amended are substantially identical with the amending paragraphs. Whilst contending that the amendment will result in the summons being excipiable, Mr Williams did not advance any credible counter argument to outsmart the submission so made. The defendants' objection to the proposed amendment is that it will render the summons excipiable on the ground that it will be vague and embarrassing.

[16] An exception raised on the ground of material vagueness is always a curable defect. It may be cured by simply amending the same summons to which an exception is raised. Exceptions to pleadings in general are governed by the provisions of Rule 23 of the Rules. Rule 23 provides:

> "(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph *(f)* of sub rule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception."

[17] The general rule applicable to pleadings is that pleadings must be drafted in a lucid, logical and intelligible manner. The cause of action or defence must appear

clearly from the factual allegations made[7]. The above is in keeping with the purpose of the pleadings which is to ensure that a summary of facts is set forth that will enable the opponent to plead thereto and come to trial prepared to meet the case of the other side and not be taken by surprise. As stated in Beck's Theory and Principles of Pleadings in Civil Actions[8], "*Pleadings should state facts and facts only… That is to say they should not contain statements of either law or the evidence required to establish the facts. Only material facts - and no others - need be alleged"*

[18] It is trite that the excipient bears the onus of persuading the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed[9]. The question to be asked in the present case is whether the plaintiff has not pleaded such material facts that upon every interpretation its summons can reasonably bear, no cause of action is disclosed.

Application of law to the facts

[19] The defendants' first complaint is that '*the plaintiff has failed to plead facts which would bring its cause of action within the framework of the various condictiones rendering the intended amendment excipiable.* In my view this is rather a technical objection that is vague in itself. The question that arises from this objection is: Can it be said that the factual basis upon which an enrichment action is founded has not been pleaded in the summons or, put differently, that because the specific *condictiones* is not specifically pleaded in the summons, the defendant is thus unable to plead thereto?

[20] The answer to the above question should be whether that particular pleading complies with the peremptory requirements for the formulation of pleadings in general as set out in rule 18 (4). Rule 18 (4) provides:

> "Each pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity to enable the opposite party to reply thereto.

[7] *Harms : Civil procedure in the Supreme Court at 263-264*
[8] *5th edition*
[9] *See Francis v Sharp 2004 (3) SA 230 C at 233.*

[21] The averments dealing with the enrichment action in the plaintiff's notice of intention to amend are contained in paragraph 20 thereof. The statement is that *"Plaintiff granted First Defendant continued occupation of the immovable property in the bona fide but mistaken belief that First Defendant would provide the necessary guarantees as required in terms of the agreement of sale (annexure "B") as amended by the addenda thereto (annexures "C", "D" and "e").* The above statement contains all the essential averments necessary to sustain an enrichment action. The statement is not vague at all to enable the defendant to plead thereto. It is not necessary, in my view, for the plaintiff to plead a specific enrichment action, neither do I find it impossible for the defendant to plead thereto.

[22] Illustrating the importance of compliance with the requirements laid down in Rule 18 (4) in *Trope v South African Reserve Bank*[10], the court said the following:

> "It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading. The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law."

[23] For the proper construction of an averment necessary to found or sustain an enrichment action, all the plaintiff has to allege is that 'the transfer or payment must

[10] *1993 [3] SA 264 A at 273A*

have been made in the bona fide and reasonable but mistaken belief that it was owed'[11]. Shutz JA in *Mc Carthy's case* (referred to in the defendant's heads of argument) referred to the four general requirements for an enrichment action suggested by Professor Lotz in *LAWSA (First Re-Issue) Vol 9 (para 76)* as being that: (a) the defendant must be enriched, (b) the plaintiff must be impoverished, (c) the defendant's enrichment must be at the expense of the plaintiff, and (d) the enrichment must be unjustified (*sine causa*).[12] The averment made by the plaintiff to sustain his enrichment action is not, in my view, vague and embarrassing so as to ground an exception. It is not excipiable.

[24] In relation to the second complaint, defendant contends that "*the averments pleaded in paragraphs 25 and 26 of the intended particulars of claim are directory contradictory to the terms of the suretyship and the facts pleaded by the plaintiff and fail to disclose a cause of action against the second defendant."* The plaintiff contends in its heads of argument, and so in argument proffered by Ms Beard at the hearing, that "the proposed amendment does not alter the existing particulars of claim, save in the change to paragraph numbers, and in any event, could not give rise to a determinable exception." Ms Beard further argued that this objection raises an interpretation of the suretyship agreement itself so as to determine which of the first respondent's obligations the second defendant undertook to perform in the event of the first defendant's failure to satisfy those specific obligations.

[25] The defendant's complaint in raising this objection seems not to be that no sufficient material facts have been pleaded but that the facts pleaded are inconsistent with the provisions of the deed of suretyship. This raises a legal argument as regards the terms of the deed of suretyship as well as the interpretation thereof. Essentially, it seems to me that the defendants would have expected plaintiff to plead legal conclusions relative to the terms of the deed of suretyship. This is fairly arguable and the best forum to argue it is rather the trial court itself. In my view if plaintiff were to

[11] *See ABSA Bank Ltd v Leech 2001 (4) SA 132 SCA*
[12] *ABSA Bank supra at 139*

plead such legal conclusions, the summons would have been defective. In *Buchner and another v Johannesburg Consolidated Investment Co Ltd*[13], De Klerk J said:

> "I emphasize the words 'shall contain a clear and concise statement of the material facts'. The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinizing the facts upon which the opinion is based."

[26] It is my view that the respective parties' legal rights, and so their corresponding obligations flowing from the deed of suretyship, is more of a matter of argument than pleading. It would be wrong, in my view, for such legal argument to be canvassed in the pleadings as the pleadings are meant for ventilation of material facts upon which a party relies for its claim. In *Buchner's* case *supra* at 217E-G, the learned Judge said that *"...an opinion or conclusion as to what the parties' liabilities are, even if undisputed, does not become a statement of fact and a failure to dispute the conclusion is of no consequence."*

[27] In consequence, I find the above objection not well measured to repulse the proposed amendment.

[28] In relation to the last objection, I cannot agree more with the sentiments expressed by my brother, Snyman J, in *Cete v Standard & General Insurance Co Ltd* (as referred to in the plaintiff's heads of argument). Suffice it to say that if the excipiability of the pleading is merely arguable or can be cured by furnishing of particulars then it is proper to grant the amendment where the other considerations are favourable. That is not the end of the road for the objector as he or she can simply file an exception to the pleading at an opportune stage. It is not the defendants' case in

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[13] *1995 [1] SA 215 T at 216H-J, Per De Klerk J*

this case that the vagueness of the summons it alleges is not curable. In view of the foregoing, this ground also cannot stand.

[29] I do not think I have to adopt an over-technical approach in this matter. A simple approach that will allow the parties to ventilate themselves at trial is sufficient. In so doing I am bound to follow Makgoka J's (as he then was) reasoning in his formulation of the principles governing an exception in *Living Hands (Pty) Ltd and Another v Ditz and Others*[14] when the learned Judge of Appeal (as he now is) cautioned that an over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

[30] Even if a particular pleading would ordinarily be excipiable on the ground that it is vague and embarrassing within the meaning and contemplation of rule 23 (1), this does not signal the end of the road for the excipient. The excipient has an obligation to comply with the provisions of Rule 23 (1) by, for example, requiring the plaintiff to remove the cause of compliant before excepting to such a pleading. Quoting the dictum by Howie J (as he then was) in *Inzalo communications & Event Management (Pty) Ltd v Economic Value Accelerators (Pty) Ltd*[15], Symon AJ said:

> "I should point out in this regard that in the *Callender* case, Howie J (as he then was) suggested that prior to the taking of the exception it would have been incumbent upon the excipient to seek clarification of the intention of the pleader of an ambiguous pleading, either by way of an appropriate request for particulars or a notice referred to in the proviso to Rule 23(1) concerning vague and embarrassing pleadings. As is set out above, the Plaintiff gave notice to remove of complaint, albeit that it was directed to establishing whether the elements of an enrichment claim had been pleaded. Had the Defendant not intended to rely upon an enrichment action, it could have pointed this out. Instead, it remained silent"[16]

[30] In the circumstances of this particular case I am of the view that amendment should be allowed to enable the parties to ventilate themselves at trial. I find the

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[14] *2013 (2) SA 368 (GSJ)*
[15] *Unreported Judgment of Symon AJ (Gauteng) under case no. 2006/20062*
[16] *Callender-EASBY v Grahamstown Municipality 1981 (2) 810 (E), 812 H-813A*

approach adopted by the court in *YB v SB & Others NNO*[17] more appropriate when the court said:

> "The primary consideration in applications of this nature seems to be whether the amendment will have caused the other party prejudice which cannot be compensated for by an order for costs or by some or other suitable order such as a postponement (Imperial Bank Ltd v Barnard and Others NNO 2013 (5) SA 612 (SCA) para 8). It is of course necessary to bear in mind that a further important object of allowing an amendment is 'to obtain a proper ventilation of the dispute between the parties' (Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D) at 638A). Our courts have also increasingly recognised that court rules and pleadings are not there for their own sake but to advance 'the good order, and the administration of justice' (Bankorp Ltd v Anderson-Morshead 1997 (1) SA 251 (W) at 253D – G). It is accepted law that a court will not allow amendments where their effect would render such a pleading excipiable or where it does not cure an excipiable pleading. (Erasmus Superior Court Practice service 42, 2012 B1 – 183). In Crawford- Brunt v Kavnat and Another 1967 (4) SA 308 (C) at 310G Tebbut AJ (as he then was) held, however, that, 'If the pleading would appear to be possibly open to exception or even if the court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment."

Costs

[31] In relation to the costs, it is my view that costs should follow the result.

[32] In the result, I grant the following order:

1. The plaintiff is granted leave to amend his particulars of claim in accordance with the notice of intention to amend dated 14 June 2018.
2. The plaintiff is directed to effect the aforesaid amendment within ten (10) days from today.
3. The defendants shall pay the costs.

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[17] *2016 (1) SA 47 (WCC)*

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H. S. TONI

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff	:	MS M. L. Beard
Instructed by	:	De Jager & Lordan Inc GRAHAMSTOWN
Counsel for the defendant	:	Mr K. D. Williams
Instructed by	:	Rushmere Noah Inc GRAHAMSTOWN
HEARD ON	:	13 SEPTEMBER 2018
DELIVERED ON	:	1 NOVEMBER 2018