REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2006/21173

In the matter between:

GUARDFORCE INTERNATIONAL TRANSPORTATION LIMITED Appellant/Plaintiff

and

KHULANI FIDELITY SERVICES GROUP (PTY) LIMITED Respondent/Defendant

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J U D G M E N T

The Court

INTRODUCTION

[1] The question to be decided on appeal by this Court is whether the court *a quo* (Snyders J – as she then was) was correct in refusing the appellant (referred to as the "*plaintiff*") leave to amend its particulars of claim (The respondent is referred to as the "*defendant*").

HISTORY OF THE MATTER

[2] On 25 March 2006 an armed robbery took place at O R Tambo International Airport. At the time of the robbery guards deployed by the plaintiff were attending to certain security duties in relation to the transfer of a container containing valuable cargo. The robbers successfully committed the robbery and escaped with a substantial amount of money. One of the security personnel was deployed in terms of the contract between the plaintiff and the defendant. He was employed by the defendant. His services were at the disposal of the plaintiff.

[3] On 22 September 2006 the plaintiff instituted action against the defendant arising out of the armed robbery. One of the claims made in the original Particulars of claim was that the court issue "*an order declaring The defendant to be liable to indemnify The plaintiff against any claim or claims brought against The plaintiff by any third party arising from the loss of the US$ 12,5 million stolen from the Plaintiff at O R Tambo International Airport on 25 March 2006*". Exception was taken to that claim on the basis that it disclosed no cause of action alternatively that it contained insufficient factual foundations to support a cause of action against the defendant.

[4] On 15 May 2007 the exception was argued and on 26 May 2008 the exception was upheld by Foulkes-Jones, AJ.

[5] On 30 July 2008 the plaintiff delivered a Notice of Amendment. The amendment was objected to by the defendant. On 5 September 2008 the plaintiff launched an application for leave to amend. The application was based on the allegation that an entity known as G4S International UK Limited ("*G4S*") sued the plaintiff for losses that it alleged it suffered arising from the theft of the moneys during the robbery. The plaintiff referred in its proposed amendment to its Particulars of Claim to allegations made by G4S in a summons issued by G4S *inter alia* against it (and also against the defendant) under Case No. 07/12735 ("*the G4S case*"). The Summons was issued in May 2007.

[6] The defendant opposed the plaintiff's application for leave to amend on *inter alia* the following basis: both the plaintiff and the defendant had been sued in the G4S matter by G4S arising out of the robbery; the claim instituted by G4S against the plaintiff in May 2007 cannot give the plaintiff a cause of action against the defendant when the plaintiff issued summons against the defendant on 22 September 2006 in the present action; the plaintiff should have followed the provisions of Rule 13 of the Rules of this Court and could have joined the defendant as a third party to the G4S action in terms of Rule 13(1)(a) and/or 13(1)(b).

PRESENT POSITION

[7] The plaintiff claims that at the time of issuing the original Summons in 2006, it was faced with at least three exceptional circumstances. These included: it had every reason to expect to be sued by the owners of the stolen money but did not and could not know who would sue it or on what cause of action it would be sued nor for how much; there is a time bar clause in its contract with the defendant which, on the plaintiff's interpretation meant that a summons had to be served "*within 6 (six) months from the date of occurrence of the loss*"; and at the time the 6 month period was about to lapse, the plaintiff had not yet been sued by anyone for the loss and it was accordingly, unable to claim from the defendant.

[8] The defendant disputed the fact that the 6 month time bar clause constituted an exceptional circumstance. It further contended that the parties entered into a binding contractual Agreement containing a time bar clause of 6 months. At the time of the entering into the contract it must have been within the contemplation of the parties that either party might be in a position where a loss occurs but it is unable to identify the person who may claim against one or the other.

[9] It is clear that at the time of the original summons, the plaintiff was faced with at least three exceptional circumstances: Firstly: It had every reason to expect to be sued by the owners of the stolen money, but did not and could not know who would sue it, on what cause of action it would be

sued, nor for how much. Several causes of action might be available to several interested parties, including claims in contract, claims in delict, and claims under the Warsaw Convention relating to the loss of goods carried by air; Secondly: There was a time bar clause in its contract with the defendant which, on the plaintiff's interpretation of the clause, meant that a summons had to be served "*within 6 (six) months from the date of the occurrence of*" the loss; Thirdly: At the time the six month period was about to lapse, the plaintiff had not yet been sued by anyone for the loss, and it was accordingly unable to claim from the defendant.

[10] The plaintiff therefore followed the route of section 19(1) (i) (a) (iii) of Act 59 of 1959 ("the Act") by claiming, in the alternative, a declaratory order.

[11] The defendant directed two exceptions to the original claim. The first was directed at the contractual claim and was dismissed. The second was directed at paragraphs 16 and 17 of the claim wherein a declaratory order was sought. That exception was upheld. The court gave the plaintiff leave to amend the claim. The plaintiff filed amended particulars of claim (the "*Amended Claim*").

[13] By this time, a second action had been instituted (by G4S) in which the plaintiff and the defendant are both parties (defendants). Each has served third party notices on the other, relying on delict and claiming contributions from each other.

[14] The Amended Claim took account of those events and sought to withdraw the delictual claim and further sought to bring the claim in this matter in line with the subsequent events (the identity of the claimant, as G4S as well as the nature and grounds for its claims, now being known).

[15] The defendant opposed the amendments and a formal application for leave to amend had to be launched. The defendant's opposition was directed at three aspects of proposed amendments. The first two objections were subsequently withdrawn. The defendant's remaining objection to the proposed amendment relates to the claim for a declaratory order and is to the effect that, at the time the original summons was issued against the defendant; the cause of action reflected in the proposed amendment did not exist (or had not been completed).

[16] The court *a quo* ruled in the defendant's favour on that point. The court *a quo* did not consider or rule on the plaintiff's argument that the claim fell under the provisions of section 19(1)(a)(iii) of Act 59 of 1959. The plaintiff's main argument in this appeal is based on that section and the court *a quo's* failure to consider and apply it.

THE PRINCIPLES RELATING TO AMENDMENTS

[19] 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* 1995 (2) SA 73 (TK) at 76D-76I. See also *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565G-566A; *Trans-Drakensberg Bank Ltd v Combined Engineering* 1967 (3) SA 632 (D) at 638A, 640A-G and 643A-C. 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: *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29. The question in each case therefore, is what do the interests of justice demand? *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).

SECTION 19(1)(a)(iii) OF ACT 59 OF 1959

[20] The learned judge in the court below did not deal with this section in her judgment. We were informed by counsel that she was addressed on this point in great detail. We are not sure why she did not deal with this legal

point. In any event we are not prohibited on appeal to apply our minds afresh on this particular legal point.

[21] The section reads as follows:

> "*A provincial or local division shall have jurisdiction over all persons residing or being and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power –*
>
> *(i)* …
>
> *(ii)* …
>
> (iii) *In its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*. (our underlining)

[22] A proper reflection of the plaintiff's claim indicates that the amended claim falls squarely within the provisions of this section and the principles set out in *Cordiant Trading CC v Daimler Chrysler Financial Services* 2005 (6) SA 205 (SCA). Jafta JA set out the following in the *Cordiant* matter:

> "*[16] Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the Court that he/she is a person interested in an 'existing, future or contingent right or obligation' and nothing more is required (Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995 (4) SA 1 (A) at 14F). In Durban City*

Council v Association of Building Societies 1942 AD 27 Watermeyer JA, with reference to a section worded in identical terms, said at 32:

> *'The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'*

[17] It seems to me that once the applicant has satisfied the Court that he/she is interested in an 'existing, future or contingent right or obligation', the Court is obliged by the subsection to exercise its discretion. This does not, however, mean that the Court is bound to grant a declarator, but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors. In my view, the statement in the above dictum, to the effect that, once satisfied that the applicant is an interested person, 'the Court must decide whether the case is a proper one for the exercise of the discretion' should be read in its proper context. Watermeyer JA could not have meant that in spite of the applicant establishing, to the satisfaction of the Court, the prerequisite factors for the exercise of the discretion, the Court could still be required to determine whether it was competent to exercise it. What the learned Judge meant is further clarified by the opening words in the dictum which indicate clearly that the enquiry was directed at determining whether to grant a declaratory order or not, something which would constitute the exercise of a discretion as envisaged in the subsection (cf Reinecke v Incorporated General Insurances Ltd 1974 (2) SA 84 (A) at 93A-E).

[18] Put differently, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

[23] In the present matter the plaintiff is clearly a person interested in an existing, future as well as a contingent right. The future right or obligation concerned is the plaintiff's right to recover from the defendant such amount as the plaintiff may be held to have to pay to the parties suing the plaintiff for the

loss of the money taken during the robbery. Conversely, the defendant's concomitant obligation falls within the terms of the section.

[24] The defendant's contention that the plaintiff ought to have waited to be sued by G4S first, before instituting an action against the defendant is defeated by the court's reasoning in the *Cordiant* matter at paragraph [19] of that decision where the court said the following:

> "*However, counsel argued that, instead of launching the present proceedings, the appellant should have waited for its buyers to institute proceedings against it. I do not agree. It is clear from what is said above, including the concession by the respondent's counsel, that the appellant had interest* (sic) *in the current proceedings. I can conceive of no basis on which such interest could be suspended until the appellant's buyers institute proceedings against it. Section 19(11)(a)(iii) certainly does not require that as a preliminary step*."

[25] The section referred to read with the *Cordiant* matter, is perhaps decisive and the court *a quo* should have granted leave to amend on this point alone.

ALTERNATIVE ARGUMENT: NEW CAUSE OF ACTION

[26] The defendant argued that the amendment sought to introduce a new cause of action which had not existed at the time the summons was issued or served, and that particulars of claim or a declaration could not be amended to include "*new causes of action*".

[27] The plaintiff disputes the contention that the claim as proposed to be amended amounts to a new claim or one which had not been completed at the time of the issue and service of the summons. The argument that it is a new claim is based on a misunderstanding of the effect of section 19(1)(a)(iii) of Act 59 of 1959. But even if there were substance in the "*new claim*" argument, the court has discretion to allow such an amendment unless the plaintiff was guilty of an abuse of the process of the court.

Bankorp Ltd v Anderson-Morshead [1996] 3 All SA 597 (W).

[28] It was further argued that the court *a quo* should have applied the principles set out in *Bankorp Ltd v Anderson-Morshead, supra*, and allowed the amendment concerned even if the plaintiff's claim were to be regarded as one which did not exist at the date of summons.

[29] The authorities relied on by the defendant are distinguishable from the present case. None of them dealt with the court's jurisdiction in terms of section 19(1)(i)(a)(iii) of Act 59 of 1959 to grant a declaratory order to determine any existing, future or contingent right or obligation in which the claimant had an interest.

[30] In any event, the authorities relied upon by the defendant make it plain that the court has a discretion to grant an amendment (where the cause of action was incomplete or did not exist at the time of summons) where there are special circumstances present.

[31] There are, in our view, special circumstances why the amendment should be granted. It would further advance the interests of justice in allowing the amendment.

[32] The concept of cause of action must bear a wide and general meaning, and not the technical meaning given to cause of action, being the phrase ordinarily used to describe the set of material facts relied upon to establish the right of action. Here, the cause of action sought to be enforced in the summons subsequent to its amendment is recognisable as the same or substantially the same cause of action as that disclosed in the original summons: *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15H-16B; *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) at 517B-C; *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at paras [14] and [15].

[33] In other words, the question to be asked and ultimately determined in this matter is whether the cause of action relied upon in the particulars of claim as amended is recognisable as the same or substantially the same as that relied upon in the particulars of claim in their original form. The answer to that is emphatic yes. The single wrongful act (if this is proved ultimately) of the defendant vested in the plaintiff a single right to damages, to sue for all loss or damage caused to the plaintiff by such wrongful act, whether such loss or damage resulted from its claim that related to contractual or delictual damage. Here there is simply no justification for distinguishing between the

right to recover for damages in respect of the claims set out in the initial summons, and the claim as set out in the amended summons.

APPLICATION OF THE COURT'S DISCRETION

[34] In the *Bankorp Ltd* matter above, Flemming DJP set out the following:

> "*Our practice has seen various instances of that which was thought to be axiomatic, if not a rule of law, losing its absoluteness. An observer may view those instances as distinct exceptions or aberrations, or when approved of, developments and refinements. But when viewed collectively an underlying explanation is exposed insofar as pleadings are concerned: the increased realisation that Court Rules, procedural principles and pleadings are not there for their own sake or for any other reason than to advance the good order and the administration of justice. Accordingly the stream has turned away from regarding a document or procedural step as a 'nullity' and has come to manage that which previously was thought to be unworkable or even unthinkable. I mention a few examples. Many cases of a summons being a 'nullity' have been discarded. Conditional claims and conditional counterclaims are managed. Conflicting alternative claims are often tolerated. Arguments that amendments are to be refused only because of delay in seeking amendment repeatedly fail. The overall pattern is ever firmer that, also in provisional sentence cases, an amendment is granted if a party deems it necessary to bring his real case before the Court. The exceptions are really limited once the party is bona fide and is not attempting to gain time. An amendment is refused when it is certain that the new view is untenable and will not assist the party or because of prejudice to another party or to the administration of justice which cannot be adequately averted by, for example, standing a case down, postponing it, reimbursing wasted costs.*
>
> *It is necessary to recognise that the trend which thus broke through a multiplicity of trammellings to amendment has also surfaced in regard to the introduction of causes of action which arose after the issue of summons.*"

[35] The learned judge went on to set out the following in the *Bankorp* matter at page 254H-J:

> "*Refusal of the amendment brings the parties no closer to the resolution of their dispute. It can achieve nothing positive. It will have negative results in terms of loss of time for the plaintiff and wasted costs. A rule which produces harm for the sake of no discernible advantage can hardly be supported. I need, however, not consider the crucial question whether stare decisis or the spirit underlying it does force me into a corner. That crucial choice can be avoided because another reason exists for holding against the defendant.*"

In having determined that the plaintiff did not have a cause of action at the time that summons was issued, the learned judge in the court *a quo* erred. In this regard, the learned judge in the court *a quo* did not exercise her judicial discretion correctly. A combination of the various factors referred to in the contemplated amendment read together with section 19(1)(a)(iii) of the Act leaves one in no doubt that the plaintiff did establish a cause of action. In any event it is trite that in the attainment of justice between the parties courts should not be obstructed by a very rigid adherence to the pleadings: *Shill v Milner* 1937 AD 101, *Trans-Drakensberg Bank Ltd supra* at 637, *Robinson v Randfontein Estates Goldmining Co Ltd* 1925 AD 173 at 198 where Innes CJ set out the following:

> "*The object of pleading is to define the issues: the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings.*"

CONCLUSION

[36] Having regard to all of the above circumstances, we believe that it would be in the interests of justice to allow the amendment as set out by the plaintiff.

ORDER

[37]

37.1 The appeal is allowed with costs, including the costs of two counsel;

37.2 The order of the court *a quo* is set aside and substituted with the following order:

> "*The application for leave to amend is granted with costs, including the costs of two counsel.*"

_____

M JAJBHAY
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree

_____

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree

_____

R MATHOPO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF JUDGMENT	26 MARCH 2010
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