REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
…8 June 2010.. DATE	**……(Signed)…...** SIGNATURE

Appeal No. A3071/209

Case No.: 13800/2000

Date of Appeal: 24 May 2010

In the matter of:-

ABSA BANK LIMITED Appellant

versus

MS T VAN RIE t/a AMAZING

YEARS PRODUCTIONS First Respondent

MS P YOUNG Second Respondent

JUDGMENT

A J Bester, AJ:

[1] The Appellant instituted an action against the First Respondent in the court below on 29 November 2000. The Appellant claimed payment of the

sum of R139,526.83 owing in respect of monies lent and advanced on an overdraft cheque account. The action against the Second Respondent is based upon an agreement in terms of which she bound herself, jointly and severally, as a co-principal debtor together with the First Respondent for due payment by the First Respondent of all monies owing from time to time by the latter to the Appellant.

[2] Some six months after the launch of the action, the Respondents requested further particulars, which were furnished in June 2001. In January 2004, the Respondents served their plea and a counterclaim and the Appellant's reply to the plea and its plea to the counterclaim were filed in July 2004. Between October 2003 and May 2007, no less than 8 notices of intention to amend were issued by the Appellant, but none were effected. The record of appeal is not complete because these notices were omitted. Nevertheless, the Respondents did not object to the record.

[3] The action was supposed to be heard by the court below on 14 May 2009. That was however not to be, as on the morning of the hearing day, the Respondents gave notice that they would raise five points *in limine*. In brief, these points included the following:-

3.1. the Appellant's claim exceeded the monetary jurisdiction of the court below;

3.2. whereas the Appellant relied upon a written agreement as against the First Respondent, the copy of the agreement attached to the Appellant's further particulars was unsigned;

3.3. the Appellant's particulars of claim, as read with its further particulars, is excipiable.

[4] The Appellant objected to the belated raising of these points and contended that they ought properly to have been raised by way of a special

plea. The magistrate rejected the Appellant's objection and ruled that, as the points comprised issues of law, they were capable of being raised and heard at the hearing in terms of Rule 29(6) of the Magistrates Court Rules.

[5] The Appellant thereupon, in terms of section 111 of the Magistrates' Courts Act, 32 of 1944, sought various amendments which it contended would dispose of the points *in limine* and enable the hearing of the action to proceed. These amendments were intended primarily to introduce an averment to the effect that the agreement upon which the Appellant's claim against the First Respondent was based, was written; alternatively oral (but incorporating the terms of the written, but unsigned agreement relied upon); or, further alternatively, tacit.

[6] The magistrate dismissed the amendment application and held as follows:-

"(Section 111) … confers a discretion upon the presiding officer whether to grant or declining an application to amend the pleadings. The test to be applied is whether such an amendment will prejudice the other party against whom an amendment is sought. In the matter at hand, the summons was issued in November 2000 and the Plaintiff brought numerous applications in terms of Rule 55 to amend its particulars which were not successful. The matter was enrolled eleven times according to the court file. Adv. Friedman argued that the court should not grant the application as it will prejudice the Defendant as the latter has been in and out of court for the past nine years. Adv. Van Berg did not argue the contrary. He did not convince the court that the Defendant will not be prejudiced. Furthermore, the Plaintiff did not explain the delay and also failed to show that his application is ***bona fide***. Thus the application in terms of section 111 is dismissed."

[7] In finding thus, the magistrate misdirected herself; for in a section 111 amendment application, generally moved whilst a hearing is already underway, but before judgment is handed down, the focus is on prejudice "*in the conduct of … (an) action or defence*".

[8] Before this court, the Appellant's counsel contended that the magistrate had therefore erred in focussing on the potential prejudice to the Respondents, brought about by the long delay between the launch of the action and the hearing date on 14 May 2009. Counsel also argued that, in any event, there was nothing upon the basis of which the magistrate could have found that Appellant was *mala fide* in moving the amendment. After all, the amendment was precipitated by the points raised *in limine* and in respect of which notice was only given on the morning of the hearing.

[9] The Appellant is in my view correct. The manner in which section 111 applications should be approached by a court, in the exercise of the discretion conferred upon it, was clearly expressed in **Trans-Drakensberg Bank Ltd. v Combined Engineering (Pty.) Ltd. and Another** 1967 (3) SA 632 (D) (albeit in relation to the corresponding provisions of the Rules of the then Supreme Court):-

"The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. Overall, however, is the vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement." (at page 638)

…

"Having already made his case in his pleading, 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 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 (*Cross v Ferreira, supra* at p. 450), or deliberately refrain until a late stage from 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..." (at page 641)

[10] In **Viljoen v Baijnath** 1974 (2) SA 52 (N), at 53, the court held that the test applied in **Trans-Drakensberg** also applies in the Magistrates' Court.

[11] Clearly, a court hearing an application in terms of section 111 has a discretion whether or not to grant it, but that discretion must be exercised judicially. From a perusal of the magistrate's reasons, she appears to have considered that the mere alleged *past* delay in the hearing of the action was sufficient a ground for a refusal of the amendment sought by the Appellant. Of course, it needs to be stressed that the Appellant had simply moved an amendment; it did not also ask for a postponement of the action. Presumably, had the amendment been granted, the Respondents might have been compelled to move an amendment. Of course, as apparently correctly conceded on behalf of the Appellant in the court below, the past delay did prejudice the Respondents. But should the prejudice occasioned to the Appellant by the past delay and the belated raising of the points *in limine* (which precipitated the amendment application) simply be ignored in this weighing up exercise? There is no indication in the magistrate's reasons that the prejudice occasioned to the Appellant and, in particular, the prejudice that would be occasioned by the refusal of the amendment, was even considered. It is also nowhere evident from the record that the past delay was attributable exclusively to conduct on the part of the Appellant. It is also evident from the amendments sought that they were by no means frivolous, intended to delay the action or to achieve some or other tactical advantage. Therefore, when the magistrate concluded (by implication) that the Appellant was at fault and that the amendments sought were not *bona fide*, she failed to exercise her discretion *judicially* and therefore erred; interference in her judgement and orders is accordingly permissible.

[12] In the fall-back, counsel for the Respondents argued on appeal that the Appellant had also unduly delayed the application for the amendment as, despite the fact that the objections raised *in limine* were not especially pleaded, the Appellant had always been aware that the objection would be taken and that it ought therefore to have moved the amendments sooner. But that submission begs the question as to whether a litigant should generally anticipate that some objection or other would be taken even if it had not been formally pleaded. Assuming, however, that the Appellant ought to have anticipated that those objections would be raised at the hearing and that there was therefore a delay in the moving of a timeous amendment to counter them, the *dictum* in **Trans-Drakensberg**, at page 642, is, in this regard, instructive:-

"In my judgment, if a litigant has delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment."

[13] The remedy referred to by the court in **Trans-Drakensberg** is of course an appropriate order for costs and, if dictated, a postponement. It is also apposite here, in the context of a possible oversight by the Appellant by not having moved the amendment at an earlier date or by not pleading more accurately, to refer to **Whittaker v Roos and Another** 1911 T.P.D. 1092, at 1102, where the court held as follows:-

“This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of

judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties."

[14] I mention here, that in the course of argument before the court below and before this court, it was contended on behalf of the Respondents that in certain respects the amendment sought by the Appellant was *res judicata*, for an application for those aspects of the amendment was heard and dismissed on 15 May 2008. However, the court below was apparently faced with a dilemma because, despite reference to the court file, there was nothing on record that tended to support that argument. The magistrate therefore, correctly in my view, ignored the submission. That argument was nevertheless repeated in this court, but we have the same difficulty. The alleged application and its contents, its alleged dismissal and the reasons for that dismissal are not incorporated in, or apparent from the record of appeal. It is thus not possible to determine that issue. As pointed out above, the Respondents did not object to the record of appeal or attempt to reconstruct a compete record and we are therefore constrained by what we have before us.

[15] Counsel for the Respondents also argued that the amendment of the Appellant's pleading to aver, in the alternative, that the agreement upon which the Appellant's claim against the First Respondent was based, was oral or tacit, constitutes an impermissible withdrawal of an admission. The admission, so the argument goes, was the allegation in the Appellant's further particulars that the agreement was written. Counsel's argument, however, loses sight of the fact that an allegation of fact in a pleading is not an admission of that fact; it is a mere allegation and it can readily be withdrawn or amended, see: **Wild Sea Construction (Pty) Ltd v Van Vuuren** 1983(2) SA 450 C at 452 G-H. In any event, that allegation was denied by the Respondents in their plea; if the Respondents had admitted it, the position might have been different: see **Levy v Levy** 1991(3) SA 614 A at 622A-G

[16] I consider, therefore, that the magistrate ought to have granted the amendment sought by the Appellant. That finding effectively disposes of the appeal in favour of the Appellant for, if the amendment ought to have been granted, it is axiomatic that the order by the court below dismissing the action with costs, cannot be sustained. But I would go further and hold that, even when making the latter order, the magistrate had erred. Having dismissed the application to amend, the magistrate found that, as the written document attached to the Appellant's further particulars comprised an unsigned credit application, "*there is no contract between the parties*". However, a document, on the face of it not signed by one of the contracting parties, but nevertheless attached to a pleading and alleged to be a copy of an agreement concluded between them, can never on its own warrant a conclusion that there was in fact "*no contract*"; at best, the allegation renders the pleading excipiable. A consequence of a finding of such excipiability is that a party would generally be afforded an opportunity by the court to amend that pleading so as to remedy it, for example by attaching a duly signed document or by amending the pleading so as to allege instead an oral agreement on the same terms. Of course, whatever prejudice is caused by that amendment, such as wasted costs and even a postponement, will in most circumstances be cured by an appropriate order for costs. It is only in very exceptional circumstances that a court would dismiss the action and, in this case, there are no such circumstances.

[17] As an aside, it occurs to me that faced by an action that, well before the hearing date on 14 May 2009, had clearly spiralled out of control, decisive intervention and case management was required by the court below in order to restore an orderly and cost-effective progression of the dispute to a final resolution. The obvious answer to that situation was for the magistrate, *suo motu*, to adjourn the action and to conduct an in-chambers section 54(1) pre-trial procedure. In the course of that procedure the issues between the parties should have been delineated and simplified, the necessity or desirability of amendments to the pleadings should have been considered and agreed and,

in particular, measures should have been considered to restore order in, and to dispose of the action in the most expeditious and least costly manner. The ultimate purpose of magistrate's court proceedings is, as I have always understood them, to provide litigants with a simplified and less costly means by which to achieve a relatively speedy resolution of minor disputes. It is lamentable that, in an action in which the pleadings were less than perfect and where, as late as nine years after its launch, substantial objections were still being raised on pleadings, the magistrate passively permitted a continuation of that sad state of affairs. Of course, the parties could themselves have convened and conducted a section 54(1) pre-trial conference, but they did not, which seems to show that both sides were delinquent and had failed to pursue an orderly resolution of the dispute. Perhaps the time has now come for the Magistrates' Courts to be more pro-active in moving cases towards resolution and, for example, to refuse to enrol actions for hearing, as is the case in the High Court, if a proper pre-trial conference has not been held.

[18] In the premises, I make the following order:-

18.1. the appeal is upheld;

18.2. the dismissal of the Appellant's application for an amendment in terms of section 111 of the Magistrates' Court Act, and the dismissal of the Appellant's action with costs, are set aside and substituted with the following orders:-

18.2.1. "*The amendments sought by the Appellant as set out in paragraphs 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.5, 2.2.6, 2.2.7, 2.3 and 2.4 of the Appellant's Notice of Appeal dated 11 June 2009, are allowed*";

18.2.2. "*the action is postponed sine die*".

18.3. the cost of the appeal is ordered costs in the action in the court below.

(Signed)

_____

Bester, AJ

Acting Judge of the High Court

8 June 2010

I concur.

(Signed)

_____

Tsoka, J

Judge of the High Court

8 June 2010