

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

CASE NO 2008/2231

- (1) REPORTABLE: *NO*  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED.

13 SEPTEMBER 2012

*FHD Van Oosten*  
FHD VAN OOSTEN

In the matter between

JURGENS JOHANNES STEENKAMP NO

FIRST PLAINTIFF

HASSEN KAJIE NO

SECOND PLAINTIFF

and

THE AFRICAN NATIONAL CONGRESS

DEFENDANT

*Practice-Rule 28 (4)- Application to amend defendant's plea - considerations arising - whether the proposed amendment constituted a withdrawal of an admission - plea inelegantly worded - court finding that it did not contain an admission - prejudice - no real prejudice resulting from proposed amendment shown - amendment allowed - costs - defendant liable for costs occasioned by amendment - plaintiff's opposition held to be fair and reasonable - defendant ordered to pay costs of plaintiffs' opposition.*

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J U D G M E N T

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**VAN OOSTEN J:**

[1] This is an application for the amendment of the defendant's plea which is opposed by the plaintiffs.

[2] The plaintiffs are the trustees of the insolvent estate of the Kebble Buitendag Investment Trust. Their claim against the defendant is for the setting aside, in terms of s 26 (1) of the Insolvency Act 24 of 1936, of alleged voidable dispositions, consisting of six payments totalling R627 286-50, made by the trust to or on behalf of the defendant, within two years of the date of sequestration of the trust. The defendant duly delivered a plea which is the contentious pleading forming the subject matter of this application.

[3] The defendant's plea in its present form has been described in argument as an "inelegantly" drawn document. In my view that description flatters what in my view constitutes, as I will demonstrate, a model of inept clumsiness. An analysis of the plea is necessary. In paragraph 1 of the plea, bearing the heading "Ad paragraphs 1 to 4", those paragraphs of the plaintiffs' particulars of claim are admitted. Paragraphs 1 and 2 of the plaintiffs' particulars of claim comprise the citation and description of the parties to the action, and paragraph 3 thereof allegations in regard to jurisdiction. Paragraph 4 of the particulars of claim (divided into sub-paragraphs numbered 4.1, to 4.8.3) is contentious: it contains all the allegations in support of the plaintiffs' claim. Those allegations, on a reading of paragraph 1 of the defendant's plea, are admitted. But, then follows paragraph 2 of the defendant's plea, which is the genesis of the ensuing difficulties. The heading thereof refers to paragraphs 4.1 to 4.8.3 of the particulars of claim. Those, as I have mentioned, were admitted in paragraph 1 of the plea. To compound the difficulties, paragraph 4.1 to 4.8.3 of the particulars of claim in fact is nothing more and nothing less than the whole of paragraph 4. In paragraph 2.1 to 2.1.3 of the plea the defendant pleads that the payments "alleged" in the plaintiffs' particulars of claim firstly, were made for value, secondly, did not result in the estate of the trust becoming insolvent immediately after they were made and, thirdly, "do not fall to be set aside as alleged or at all". Although these allegations constitute valid defences to the plaintiffs' claim the fact of the payment of the amounts alleged by the plaintiffs is not denied. Then follows the high water mark of confusion: in paragraph 3 of the plea, after

the introductory words “Further alternatively to paragraphs (sic) 2 above and in the event of the plaintiffs prove (sic) that the sum mentioned in paragraph 4.1 of the plaintiffs particulars of claim was paid by [the trust] to the defendant as alleged in paragraph 4.1 to 4.6 of the plaintiffs’ particulars of claim, then and in that event, the defendant pleads as follows...”, a bare denial of all the sub-paragraphs of paragraph 4 of the plaintiffs’ particulars of claim follows. The “further alternative” pleaded makes no sense: it is not preceded by any other alternative. Furthermore, the eventual denial is irreconcilable with the admission in paragraph 1 of the plea.

[4] The trial of the action was set down for hearing on 17 August 2012. On 20 July 2012 the defendant delivered the notice of amendment we are now concerned with. In their opposition to the proposed amendment the plaintiffs heavily relied on the prejudice they would have suffered merely a month before the hearing. That however was overtaken by other events: the trial was postponed *sine die* by Boruchowitz J, which was as a result of the plaintiffs’ inadequate discovery of documents. The prejudice relied upon accordingly, no longer exists. In the pre-trial procedures the plaintiffs, not surprisingly, addressed their concerns regarding the meaning to be ascribed to the defendant’s plea as it stands as follows: the defendant was asked whether it in fact admitted the payments relied upon by the plaintiffs and they moreover informed the defendant that the plea was regarded as excipiable.

[5] The defendant indeed found itself engulfed in muddy waters. In the proposed amendment the defendant denies all the payments as well as the plaintiffs’ allegations in support of its claim. The denial, the defendant submitted, is justified in view of it having become apparent from certain documents discovered by the plaintiffs, that the trust’s business and in particular funds flowing in and out of its bank account, was tainted with fraud. Be that as it may, much of the argument before me focussed on the question whether the defendant, in the proposed amendment, in fact seeks to withdraw an admission.

[6] The principles applicable where a party seeks to withdraw an admission are well-established and need not be repeated here. But before those principles can be considered it is necessary to establish, on a reading of the pleading as a whole, whether


an unqualified admission was indeed made. In my view and as is apparent from the above analysis of the defendant's plea, it is not capable of an interpretation that it conveys an unqualified admission. I do not think that it would be proper to hold the defendant bound to an "inelegantly" drafted plea which in its wording is contradictory and in any event, ambiguous. I accordingly approach this application on the basis of an application for an amendment not involving the withdrawal of an admission.

[7] The principles governing amendments are well-entrenched: amendments will always be allowed unless the amendment is *mala fide* or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs (see *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC) 261C-E). In all the circumstances of this case there is nothing to show *mala fides* by the defendant in seeking the amendment. The only possible real prejudice the plaintiffs may have suffered no longer exists. It follows that the amendment ought to be allowed.

[8] I turn now to the costs of the application. The defendant, in my view quite correctly so, accepted liability for payment of the costs occasioned by the amendment. What remains for determination are the costs of the plaintiffs' opposition. The plaintiffs' opposition in my view was fair and reasonable (*Zaruk v Parvathie* NO 1962 (3) SA 872 (D) 885B-E): *ex facie* a copy of a cheque filed as part of the documents in this application, the one payment of R235 000-00 relied upon by the plaintiffs (par 4.3 of the particulars of claim) was made by the trust to the Western cape branch of the defendant. The proposed amendment merely containing a denial, does not deal with this payment at all. Except for remarking that this in itself provided sufficient ground for the plaintiffs' opposition, I refrain from commenting any further on it.

[9] In the result the following order is made:

1. Leave is granted to the defendant to amend its plea in accordance with the defendant's notice of intention to amend dated 19 July 2012.
2. The defendant is ordered to pay the costs occasioned by the amendment including the plaintiffs' costs of opposing the application.



**FHD VAN OOSTEN**  
**JUDGE OF THE HIGH COURT**

**COUNSEL FOR PLAINTIFFS**

**PLAINTIFFS' ATTORNEYS**

**COUNSEL FOR DEFENDANT**

**DEFENDANT'S ATTORNEYS**

**DATE OF HEARING**  
**DATE OF JUDGMENT**

**ADV JW STEYN**

**BROOKS & BRAND INC**

**ADV BM GILBERT**

**BRIAN KHAN INC**

**12 SEPTEMBER 2012**  
**13 SEPTEMBER 2012**