REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 3326/2013

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

....
DATE SIGNATURE

In the matter between:

STONEY NGWENYA Applicant

and

TOKOLOGO MALETE Respondent

J U D G M E N T

MASHILE, J:

[1] This is an application brought in terms of Uniform Rule 28. The Applicant seeks leave to amend his particulars of claim to remove a source of complaint that has been pointed out by the Respondent.

[2] The Respondent objects thereto on the ground that the proposed amendment will not rid the particulars of claim of their vague and embarrassing nature.

[3] The background facts are that the Applicant issued summons against the Respondent wherein he claims payment of damages occasioned by the Respondent's negligent failure to promptly serve and file the Applicant's claim for damages arising out of a motor vehicle collision against the Road Accident Fund.

[4] On 29 October 2013 following the service of the summons upon the Respondent, the Respondent served and filed a notice of irregular step in terms of Rule 30(2)(b) and Rule 23(1) in which he singled out paragraphs 6.1 and 10 as being the source of complaint.

[5] The complaint was that the Applicant avers in both paragraphs that he and the Respondent entered into a verbal alternatively, a written mandate agreement in terms of which the Respondent agreed to institute an action for damages against the Road Accident Fund on his behalf.

[6] The Respondent stated in its notice that claiming that the agreement was in writing alternatively, verbal rendered the particulars of claim vague and embarrassing in terms of Uniform Rule 18(6) and Rule 18(12).

[7] The Respondent vied that the Applicant's averments as set out in his particulars of claim were imprecise and uncertain on what the terms of the verbal or written agreements were. Furthermore, Applicant had omitted to attach a copy of the written contract.

[8] In view of the above, the Respondent was prejudiced by the uncertainty whether there existed a written agreement or not. What's more, argued the Respondent, he was embarrassed on how to plead on account of the ambiguity.

[9] The Applicant acknowledged that his particulars of claim were indeed vague and embarrassing in that respect and accordingly on 30 October 2013 delivered a notice of intention to amend his particulars of claim by deleting the words "*alternatively a written agreement*".

[10] In response to the Applicant's Rule 28 Notice, the Respondent served and filed a Notice of Objection on 12 November 2013 to the Applicant's anticipated amendments contained in his Notice in terms of Rule 28.

[11] The Respondent finds the particulars of claim objectionable in that it does not comply with Uniform Rules 18(4) and (12) and 23. The particulars fall short of compliance with Rule 18(4) as it does not contain a clear and concise statement of the material facts and it is vague and embarrassing as envisaged in Uniform Rule 23.

[12] In his paragraph 2.2 of his Notice of Objection the Respondent states that the Applicant alleges in paragraph 6.1 of his particulars of claim that:

> "... *the Plaintiff...and the Defendant...entered into a verbal agreement of mandate for the institution of an action for damages against the Road Accident Fund*."

"2.3 In paragraph 6.2 where the Plaintiff alleges that "*it was explicitly alternatively tacitly further alternatively impliedly agreed between the Plaintiff and the Defendant representative*...

2.4 In his subparagraphs 6.2.1 to 6.2.6, the Plaintiff suggests that there was a contingency fee agreement between the Plaintiff and the Defendant. However, no such allegation is made.

2.5 Therefore the Particulars of Claim lack the necessary averment to sustain a cause of claim.

2.6 Furthermore, it is unclear what the material terms of the verbal agreement were.

3. Accordingly the Defendant is prejudiced by the uncertainty and furthermore embarrassed on how to formulate his plea as a result thereto.

4. Plaintiff alleges that the only terms of the verbal agreement were only those explicit alternatively tacit or further alternatively implied."

[13] The Applicant has pointed out that none of the complaints set out in the Respondent's Notice of objection were in the original notice by which he required the Applicant to remove the source of the complaints that he had listed.

[14] The Applicant detests the piecemeal objections and finds that they are devoid of any merit whatsoever. Instead of attending to these further complaints raised in the Respondent's objection, he launched this application and implores this court to make a determination on whether the objection raised by the Respondent is valid or not.

[15] It is trite that the power of the court to allow amendment is limited only by consideration of prejudice or injustice to the opponent. See Page B1-179 of *Superior Court Practice* by Erasmus, Farlam, Fichardt & Van Loggerenberg. The fact that the outcome of the amendment may result in the one party losing the case is no reason not to allow an amendment.

[16] The general approach is, it would seem, to tolerate amendments especially in instances where the application to amend is not characterised by mala fide and where such amendment will not cause injustice or prejudice to

the other party. The amendment will readily be granted in particular, where the injustice or prejudice can be cured by either postponement or costs. See *Devonia Shipping Ltd v MV* Luis *(Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C), *O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) and *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W).

[17] The general approach that has been adopted by courts is that if excipiability will render a pleading in its amended form indubitably excipiable then the amendment should be declined. See in this regard *Krishke v Road Accident Fund* 2004 (4) SA 358 (W).

[18] However, if the excipiability of the pleading is only arguable or can be solved by the supply of particulars, then it becomes appropriate to grant the amendment where the other considerations are favourable.

[19] A party who feels that he has been negatively affected by an amendment which should not have otherwise been allowed by a court should always be at liberty to subsequently except to the amended pleading. Steyn J in *Pieters v Pitchers* 1959 (3) SA 834 (T) quoting from *Walker v Taylor*, 1934 W.L.D. 101, stated:

> "*I may just point out that in the case of Walker v Taylor, 1934 W.L.D. 101, the following was said in the head-note:*
>
> > *'When proposed amendments to a summons or declaration are objected to on the ground that they would oust the jurisdiction of the Court, the proper course is to allow the amendment to be made and then to except to the amended declaration or plead specially to the jurisdiction of the Court*.'"

[20] The Respondent has pointed out several ways in which he believes the Applicant's particulars of claim do not comply with Uniform Rules 18(4) and 23 and I have uplifted these from the Respondent's notice of Objection and they are:

"*It does not contain a clear and concise statement of the material facts*;

In paragraph 6.1 the Plaintiff alleges, in his proposed amendment, that "*... the Plaintiff...and the Defendant...entered into a verbal agreement of mandate for the institution of an action for damages against the Road Accident Fund*".

In paragraph 6.2 where the Plaintiff alleges that "*it was explicitly alternatively tacitly further alternatively impliedly agreed between the Plaintiff and the Defendant representative...*";

In his subparagraphs 6.2.1 to 6.2.6, the Plaintiff suggests that there was a contingency fee agreement between the Plaintiff and the Defendant. However, no such allegation is made.

Therefore the Particulars of Claim lack the necessary averment to sustain a cause of claim.

Furthermore, it is unclear what the material terms of the verbal agreement were. Accordingly the Defendant is prejudiced by the uncertainty and furthermore embarrassed on how to formulate his plea as a result thereto.

It is uncertain whether the Plaintiff alleges that the only terms of the verbal agreement were only those explicit alternatively tacit or further alternatively implied."

[21] I shall turn to each of the above.

IT DOES NOT CONTAIN A CLEAR AND CONCISE STATEMENT OF THE MATERIAL FACTS

[22] The basis on which the Respondent makes this allegation is unclear as he does not substantiate. The particulars of claim, if the amendment is allowed, will read that "*... the parties concluded a verbal mandate agreement*" and not "*a verbal or written agreement*". I agree with the Applicant that the particulars of claim sets out all the relevant material facts that are necessary and capable to sustain his cause of action. In the absence of any explanation this objection must be turned down as lacking in merit.

In paragraph 6.1 the plaintiff alleges, in his proposed amendment, that *"... the plaintiff ... and the defendant ... entered into a verbal agreement of mandate for the institution of an action for damages against the road accident fund*".

[23] Like with his first objection, the Respondent does not in any manner elaborate on his objection other than just making the above bare allegation. There is nothing ambiguous or embarrassing about the aforesaid allegation.

In view of that, the court cannot but dismiss the objection.

In paragraph 6.2 where the plaintiff alleges that "*it was explicitly alternatively tacitly further alternatively impliedly agreed between the plaintiff and the defendant representative...*"

[24] I can find no fault with the manner in which the Applicant has made the above allegation and in view of the lack of some kind of demonstration that it is validly objectionable, the court rejects it. Terms and conditions of any contract, whether written or verbal, can be implied or tacit or express. Pleading in the manner the Applicant did is perfectly in order.

In his subparagraphs 6.2.1 to 6.2.6, the Plaintiff suggests that there was a contingency fee agreement between the Plaintiff and the Defendant. However, no such allegation is made.

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[25] The Applicant asserts that he entered into a verbal mandate agreement with the Respondent. He then proceeds to set out the terms and conditions of that agreement in Paragraph 6.2.1 to 6.2.6. The Respondent insinuates that insofar as some of the subparagraphs of paragraph 6 suspend payment until settlement of the case, the agreement is contingent and

accordingly, the Applicant should have made the necessary allegations pertaining to a contingency fees agreement as envisaged in the Contingency Fees Act No.??? of 1997.

[26] The Applicant maintains that he concluded an oral mandate agreement and that there is just no allusion of a contingency fees agreement. In this regard he referred me to the definition of a 'contingency fees agreement' as set out in Section 1 of the Act, which is defined as follows:

> "**'contingency fees agreement**' means any agreement referred to in section 2 (1)."

Section 2(1) states:

> "*Notwithstanding anything to contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such a client in which it is agreed –*
>
> *(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;*
>
> *(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.*"

[27] The Respondent is adamant that the agreement that he concluded with the Applicant is simply a mandate agreement which is not required by any legislation to comply with the requirements delineated in the Act in respect of contingency fees agreements. That it is not a contingency fees agreement is not arguable as it does not meet the requirements laid down by the Act.

[28] At common law attorneys are entitled to reasonable fees for work actually done. What the Respondent tags as a mandate agreement is therefore nothing less than a contingency agreement that does not comply with the Act because it seeks to postpone the attorney's fees until payment of the capital claimed is paid. See in this regard the case of *De la Guerre v Ronald Bobroff& Partners Incorporated and others* [2013] JOL 30002 (GNP). The outcome of that judgment has since been confirmed by both the Supreme Court of Appeal and the Constitutional Court.

[29] The court has not been asked to adjudicate on the validity or invalidity of contingency agreements but rather it has been entrusted with the duty of deciding whether or not the Applicant should be permitted to proceed with the proposed amendment. The averments that the Applicant has made in respect of the alleged mandate agreement are in fact sufficient to sustain a cause of action.

[30] Moreover, it is trite that an amendment will only be declined if allowing it will result in the pleading intended to be amended becoming excipiable. See *Krishke v Road Accident Fund*SA (supra). If the Respondent feels

strongly that the pleading that the Applicant aims to amend will be excipiable, he still stands a chance to set down the exception for argument before another court. It was therefore hasty for the Respondent to have objected to the amendment at this stage.

[31] The Applicant has ardently argued that the general rule that the party proposing the amendment bears the costs of the amendment should in light of the facts of this matter be varied. The Respondent, contended the Applicant, should not have objected for the second time. He wasted time in that he brought these applications piecemeal instead of easily congesting them into one.

[32] In consequence of the manner in which the Respondent dealt with this matter, the Applicant was compelled to unnecessarily direct energy towards the preparation and argument of the second objection. I cannot but agree with the Applicant that he incurred unnecessary costs and for that matter I am prepared to depart from the general rule as delineated above and make a somewhat unprecedented order directing the Respondent to bear the costs of the amendment .

[33] In the result I make the following order:

1. The application to amend succeeds; and

2. The Respondent is to pay the costs.

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 3 March 2014z
Date of Judgment: 22 April 2014

Counsel For Applicant: Adv. Michael Suttner
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Instructed by: Malete Attorneys