**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION**

**CASE NO: 09978/2007**

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

12/11/15
DATE

SIGNATURE

In the matter between

**INTENSE HEAT INVESTMENTS** **Plaintiff/ Applicant**

**And**

**VTC AFRICA DEVELOPMENTS** **Defendant/Respondent**

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**JUDGMENT**

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**VICTOR J:**

[1] The plaintiff seeks to amend its particulars of claim in terms of a notice date 23 October 2013. The defendant contends that paragraphs 5-8 of the intended amendment introduces a new claim in terms of which it seeks to attribute to the defendant liability for the delay in completing a housing development which resulted in the development being affected by the

economic meltdown in the housing market and the market generally.

**BACKGROUND HISTORY**

[2] The total amount initially claimed was R2 million and this eventually rose to R17 980 000. The defendant's opposition is threefold, firstly the claim has prescribed, it contended that the new claim arose at the end of 2007, and the amendment was sought to be introduced in October 2013. A second objection is that the plaintiff has failed to plead all the elements of its cause of action thus sought to introduce new facta probanda, and thirdly if allowed it would leave the particulars of claim vague and contradictory, resulting in the defendant being unable to plead to the amendment.

[3] Pursuant to submitting a tender during 2003 the plaintiff tendered and was awarded a contract to construct housing on a vacant piece of land situated at La Lucia, KwaZulu-Natal. The plaintiff wished to exploit a business opportunity by erecting residences and selling them off to prospective purchasers. During February or March 2004 the tender was awarded to the plaintiff and the terms and conditions of the agreement were that the plaintiff had to adhere to an environmental management plan, landscaping, building design codes, and more particularly time was of the essence in that the land was required to be developed within a period of three years from date of transfer.

[4] The plaintiff was required to ensure that the site development plan, (the SDP) was in accordance with the precinct plan, building design code and environmental management plan. The SDP had to be reviewed and was for submission with the building plans.

**The plaintiff's claim**

[5] During November 2004 and at Johannesburg an agency agreement

was concluded. The defendant was appointed as the plaintiff's agent for the purposes of erecting the development and was responsible for the entire appointment of the professional team. The plaintiff would pay a total of R17 million for the defendant's services in various tranches. Time was of the essence in that exploiting the property market at that time would attract higher sales. The plaintiff fulfilled its obligations and made payment to the defendant in the amount of R650 000 in respect of a pre-construction marketing phase, and R600 000 as part payment of the construction phase. The defendant breached the agreement on or about 28 February 2005. On 5 August 2005 the plaintiff cancelled the agency agreement.

[6] It was asserted that the defendant misrepresented to the plaintiff that the concept plan was approved and that the development would proceed and thus induced the plaintiff to make part payment of R600 000. The plaintiff initially claimed damages in the sum of R1 250 000 and of this R188 500 was for special damages for expenses incurred by the plaintiff for advertisements, marketing and marketing launches and such expenses were incurred in relation to the expected performance by the defendant. The plaintiff contends that special damages are referred to in the original claim means that special damages were within the contemplation of the parties at the time the agency agreement was concluded. This is crucial to the assessment of the intended amendment.

[7] Various attempts were made by the applicants to amend the particulars of claim and it is the present amendment that has to be considered. The amendment avers the following: that the defendant professed to be vested with skill in designing residential areas and townships and it could optimise the plaintiff's desire to construct an upmarket gated estate in compliance with development restrictions, that it would adhere to professional standards prevailing and so would its project managers. The plaintiff avers that the defendant deviated from the standard required in preparation of the SDP. The SDP was not in compliance with the desired

parameters and restrictions and approval of the SDP was refused. It is common cause that the plaintiff could not adhere to the pre-determined construction commencement date of 1 May 2005.

[8] In respect of claim C the design concept developed for the development was completed by February 2005, construction was to begin as indicated in May 2005 and be completed in 18 months. The development was marketed and launched during February 2005 and again in March and April 2005. One third of these units were reserved for purchase. As a result of the defendant's breach the plaintiff appointed another agent to prepare, concept and design plans in late 2007. The amendment now introduces the economic meltdown and how it impacted on the demand for property and that the plaintiff had to adjust completely for a different economic market and this development is still incomplete.

[9] In this third amendment the plaintiff claims that it sustained losses consisting of the difference between profits the plaintiff is currently deriving from the development, as compared with the profits it would have derived had the development been completed timeously and had it served the upmarket gated community. The claim presently is for R16 540 612. The plaintiff contends that the proposed amendment provides for an extension of the special damages claim that had been foreshadowed. The plaintiff claims that in the original particulars of claim, more particularly paragraph 14.2 thereof, and I quote:

> "It was the appropriate time for purposes of exploiting the property market and attracting higher sales in respect of the development."

[10] The plaintiff contends that the contested part of the amendment includes the calculation of damages, which it claims has been properly

pleaded. There was no objection to the special damages previously pleaded. The plaintiff contends that it is really introducing new facts *facto probantia* and not new *facto probanda*. The plaintiff contends that the particulars set out in claim C, paragraph 32 to 37, must be read in conjunction with paragraph 14 of the original particulars of claim:

> 'It was a further material term of the agency agreement that time was of the essence in erecting the development, as the delay in erecting the development will cause expense to the plaintiff in the form of holding costs and it was the appropriate time for purposes of exploiting the property market and attracting higher sales in respect of the development."

[11] Originally claim C was only for the holding costs. By 2007 the defendant had not really been alerted to the special damages as contended for in the intended amendment of the particulars of claim. The plaintiff's case is that the damages were really in contemplation of the parties at the time that the agency agreement was concluded, time was of the essence in order to obtain higher sale prices. It is the plaintiff's claim that this is not a new cause of action; it is not seeking to introduce a new right of action, but seeks to amplify its special damages claim. It relies on Moolman *vs. Estate Moolman*, 1927 (CPD) 27, *Commercial Union Assurance Company Limited vs Waymark NO* 1995 (2) SA 73(TK), *O'Sullivan vs Heads Model Agency CC* 1995 (4) SA 253 (W). On the question of a new right of action see the case of *Evans v Shield Insurance Co Ltd 1980(2) SA 814 (A).*

[12] The plaintiff contends that although there are differences between the *facto probanda* necessary to prove the original cause of action and those necessary to prove the amended claim, this does not lead to the conclusion that the original summons did not interrupt prescription. A new or different *facto probanda* introduced by an amendment may interrupt prescription, see

*First Rand National Bank vs. Nedbank Swaziland Limited*, 2004 (6) SA 317(SCA) Scott JA stated:

> 'As observed by Corbett JA in Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 842E - F, 'it is clear that the "debt" is necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt'. The distinction between 'right of action' and 'cause of action' has been repeatedly emphasised by this Court. More recently in CGU Insurance Ltd v Rumdel Construction (Pty) Ltd [2003] 2 All SA 597 (SCA), para [6], at 601c - d a 'debt' (and hence its correlative 'right of action') was noted to 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. '

[13] In *Schnellen v Rondalia Assurance Corporation of SA LTD* 1969 (1) SA 517 (W) Trollip J referred to Spencer Bower in para. 331 of his Res Judicata paragraph:

> '(W)here there is substantially only one cause of action, and it is a case, not of 'splitting separable demands' but of splitting one demand into two quantitative parts, the plea is sustained. In homely phrase, a party is entitled to swallow two separate cherries in successive gulps, but not to take two bites at the same cherry. He cannot limit his claim to a part of one homogenous whole, and treat the inseparable residue as available for future use, like the good parts of a curate's egg.'

[14] The right of action subsequent to its amendment is in my view not recognisable as the same or substantially the same right of action as that disclosed in the original summons. There were no special circumstances pleaded in relation to this claim. It refers to delays and holding costs and that it was the appropriate time for attracting higher sales. There is no reference

to the nature and circumstances of the right as set out in the amended particulars of claim which deals with the economic meltdown and was not suggested in the original particulars of claim. I find that it is not a mere expansion of the original claim.

**Historical evolution of the claim**

[15] One of the circumstances relevant to the determination of the intended amended claim is whether the special circumstances regarding the buoyant economy would be affected by what was an unforeseen major catastrophic economic meltdown. This was not suggested in the original particulars of claim and therefore the amendment is not simply an expansion of the original cause of action as referred to above. see *Shatz Investments Pty (Ltd) vs.Kalovymas* 1976 (2) SA 545(A) at 550, see also *Garavelli & Figli vs Gollach and Gomperts Pty(Ltd)* 1959(1) SA 816(W) at 819(F) to 819(D)

> 'if there were special circumstances which were, at the time when the contract was made, known by or communicated to the party who ultimately breached it... '

[16] The plaintiff contends that the special circumstances were known to both parties and in this regard refers to paragraph 14 of the original particulars of claim. This submission must fail when the original particulars of claim are compared with the proposed amendment.

[17] Following upon *Garavelli & Figli* supra in comparing the facts pleaded in the original particulars of claim and the intended amendment the 'exceptional' facts pertaining to the special circumstances of the economic meltdown were not there.

[18] In analysing the historical evolution of these various applications to amend it is necessary to take into account that this is a third attempt on the part of the plaintiff to affect an amendment to claim C of its particulars of claim. I have already alluded to the vast jump in quantum which the plaintiff seeks at this stage. In the first amendment, which the plaintiff did not persist with after the defendant's objection, the plaintiff sought to increase the quantum of claim C to R10 950 000. The cause of action remained the same, but the time periods were to be adjusted and the quantum commensurate therewith. The plaintiff sought to complain of costs in the form of levy charges, this is in the first amendment, municipality rates and taxes and related charges from September 2005 to March 2010.

[19] The second amendment was filed on 16 April 2010 and after the defendant objected it was followed by the third amendment. In the second amendment the plaintiff sought to increase the quantum of claim A from its existing R643 897.26 to R60 million, including a claim for R4 469 184 in respect of levy charges and municipal rates and taxes for the period January this time 2008 to April 2010. In the second amendment the plaintiff retained paragraph 32 and 33 of the original particulars of claim, deleted the remaining 34 to 37 and substituted new paragraph 34 to 41. The material new allegations pleaded were as follows and I quote paragraph 34:

> 'In consequence of the breach aforesaid, and notwithstanding the construction phase commencing during May 2006, the plaintiff was not able to cause the development to be completed within the projected time period of 18 months. The first phase, only consisting of 38 units on portion 4, was completed of which six units were sold and the plaintiff was unable in the economic climate prevailing at the time to dispense of the remaining 32 units which had been erected on portion 4, and consequently became obliged to carry excessive holding costs.'

Paragraph 35:

> 'During September/October 2008 and whilst the plaintiff was in the process of erecting the first 38 units on portion 4, the global economic meltdown ensued, hence the claim for holding costs was retained, albeit as only part of an overall much greater claim.'

[20] The defendant submits that this was an attempt to entrain another cause of action on the existing cause of action. It is the defendant's case that even in that amendment an entirely new cause of action was introduced for loss of profits. The plaintiff now contends it would have enjoyed the benefits of that particular economic era but for the defendant's breach. This was not a claim that had been pleaded on behalf of the plaintiff before its claims A to C. The defendant objected to the proposed amendment and the grounds were similar to the objections in this third amendment which I am adjudicating. The defendant objected.

[21] The plaintiff did not persist with its second amendment, but waited another three years and filed a third notice of amendment on 23 October 2014. There is an extensive affidavit from Ms Gayworth of the defendant's attorney, none of which is denied by the plaintiff in its replying affidavit that the plaintiff had repeatedly filed amendments at a time shortly before the trial actually was scheduled to commence and that the effect of these amendments were to frustrate the commencement of the trial. Notwithstanding the complaints it is still necessary to assess the third amendment as the postponements and amendments may have been justified in order to ventilate the true triable issues between the parties. It does not seem to me that this third amendment is really aimed at a postponement of the trial; instead it seems that the plaintiff is bent on amending its particulars of claim to introduce this very large claim to contend with the consequences of the economic meltdown.

[22] In analysing the current amendment it is clear that the main aim of the amendment pertains to claim C where existing paragraphs 32 to 37 of the particulars of claim are deleted which is really the whole of claim C, and it also deletes the claim for holding costs entirely from the particulars of claim. It now seeks to introduce a claim for loss of profits in paragraph 39 and the claim is R16 546 212. The amendment now refers to the difference between what it could have sold the units before the economic meltdown had they been timeously built pursuant to the defendant's appointment, and at what the plaintiff can currently sell the units for in this depressed economic market.

[23] This is a claim for loss of profits that had never been claimed before. The material *facto probanda* on which the claim is currently based has never formed part of the original particulars of claim. There were no facts in the original particulars of claim which form the basis of a loss of profits claim.

**Prescription**

[24] In the original cause of action the plaintiff sought holding costs incurred during the period 1 May 2005 when the construction should have begun to May 2006 when the construction actually began. On the plaintiff's own facts therefore the cause of action would have arisen by no later than May 2006. Having found that the claim sought to be introduced is a new one it follows therefore that the claim would have prescribed by May 2009. It is on this basis that the claim is dismissed and there is no need to deal with the other aspect raised by the defendant.

[25] In my view the amendment that is sought to be introduced has prescribed in terms of the Prescription Act 68 of 1969 and on this basis alone the amendment falls to be dismissed.

In the result I make the following order.

The application for amendment is dismissed with costs.

**M. VICTOR**
**JUDGE OF THE HIGH COURT**
**GAUTENG LOCAL DIVISION**

Appearances:

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|---|---|
| Case Nr: | 09978/2007 |
| Counsel for Plaintiff: | J Wasserman SC<br>Maisels Chambers |
| Counsel for Defendant: | BE Leech SC<br>Thulemela Chambers |
| **Date of hearing:** | 2015-01-28 |
| **Date of judgment:** | 2015-02-05 |