IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/45277

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **TES**
(3) REVISED.

8 June 2020 **(SIGNED)**
.....
SIGNATURE

In the matter between:-

ERGO MINING (PTY) LIMITED Applicant/ First Defendant

and

EKURHULENI METROPOLITAN MUNICIPALITY Respondent/ Plaintiff

ESKOM HOLDINGS SOC LTD Second Defendant

JUDGMENT

SPILG, J

INTRODUCTION

1. This is an opposed application for leave to amend a plea and claim in reconvention.

   It will be useful to briefly sketch the nature of the case.

2. Ekurhuleni Metropolitan Municipality, as plaintiff sued Ergo Mining (Pty) Ltd for payment of close to R73.5 million plus interest in respect of charges for electricity which it alleges it has been supplying to Ergo at its Ergo plant ("*E Plant"*) since the end of November 2014. Ergo denied the claim and raised a number of defences which included a denial that the Municipality had been supplying it with electricity[1].

3. In its plea Ergo maintains that it receives its supply of electricity from Eskom Holdings SOC Ltd and has been paying over to the Municipality only the amount it claims it is liable for in terms of Eskom's Megaflex tariff rates - the Municipality's claim therefore is the difference between the Eskom tariff and what it has been charging Ergo.

4. At the time it pleaded Ergo also instituted a claim in reconvention for an amount of just under R89.5 million. This represents the difference between the amount it had in fact paid the Municipality between the period December 2008 to November 2014 and the amount which the Municipality was liable to pay over to Eskom, being also the amount that it, Ergo, would have been obliged to pay Eskom directly in terms of the Megaflex tariff.

5. The causes of action relied on in the existing counterclaim were based on unjust enrichment under the common law in terms of the *condictio sine cause*, alternatively under the common law infused with the constitutional protection afforded to property rights under s 25(1), (2) and (3) of the Constitution.

   This was expressed as follows in para 48 of the counterclaim

[1] Plea para 12.1

> "*All of the payments …. were made by the defendant without just cause and in the bona fide and reasonable but mistaken belief that the defendant was legally obliged, in respect of electricity supplied to and consumed at the Ergo Plant, to pay to the plaintiff the amounts purportedly levied by the plaintiff in terms of the plaintiff's by-laws."*

The underlying basis was a limitation on the Municipalities lawful entitlement to raise a charge for electricity consumption by Ergo at its E plant in excess of that which Eskom would have charged Ergo directly for one of several reasons pleaded in the alternative.[2]

6. In response the Municipality raised a special plea of prescription on the grounds that the amount claimed was a debt within the meaning of the Prescription Act 68 of 1969. It also pleaded over on the merits.

7. In June 2018 Ergo gave notice under R 28(1) of its intention to amend the plea and counterclaim. Plaintiff objected to the amendments on a number of grounds. This led to the plaintiff delivering a revised notice of intention to amend at the end of August 2018.

   The Municipality remained dissatisfied and delivered a fresh notice of objection in September 2018. Ergo responded with its present application for leave to amend under R. 28(4).

GENERAL

8. An amendment will generally be granted to enable the real issues between the parties to be properly ventilated. It follows that a pleading which does not disclose a cause of action or defence will not qualify or where it is self-evident that no case could be made out in fact or law. An amendment will also not be granted if it

[2] Compare paras 29 to 34 of the earlier judgment delivered in October 2019 between the same main parties

results in prejudice that cannot be cured by an award of costs or a postponement. In this regard an amendment to cure a tactical advantage which the other party may enjoy is not the type of prejudice which will suffice and although an exception may be raised if the other party fails to cure a pleading which is vague and embarrassing the requirement of prejudice remains.

Prejudice will however arise if an admission is sought to be withdrawn without a reasonable explanation; if only because it is pointless running a trial if the party concerned is unable on paper to explain away a material statement against interest.

Finally, for present purposes, provided the substance of the matter claimed in an amendment, as opposed to say its precise legal characterisation, is set out in the original claim then it will remain the same "*debt"* for purposes of avoiding prescription. A claim for contractual damages may be amended by introducing, in the alternative or even in substitution, a claim based in delict if it arises out of the same set of events, even though in the latter case elements such as negligence and a duty of care would have to be introduced[3].

Colman J in *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265H-266A said in relation to cases where an amended cause of action was sought to be introduced that:

> *'The effect of those cases, as I understand them, was that in deciding whether prescription was interrupted, in relation to a particular claim, by prior process served during the prescriptive period, one looks to see whether in the earlier process the same claim was preferred, not whether the same cause of action (or any cause of action) was made out in the earlier process. As pointed out in one of the cases, it is inaction, not legal ineptitude, which the Prescription Act is designed to penalise.*

[3] See *Erasmus v Inch and another* 1997 (4) SA 584 (W) per Wunsh J at 591F-592A.

It seems to me that in an inquiry of this kind the expression "cause of action" can be misleading. Its most common use is as a technical term relating to pleading, and in that sense it carries a connotation which is inapposite when one is looking to see whether or not the running of prescription has been interrupted. It is true that Trollip J (as he then was) used the term "cause of action" when dealing with a question of prescription and its interruption in Schnellen v Rondalia Assurance Corporation of SA Ltd 1969 (1) SA 517 (W). But, he was not, I think, using the expression in its narrow technical sense; what he meant by it was, I think, something of a broader nature which is sometimes referred to as a plaintiff's "right of action" or as "the basis of his claim" ".

GROUNDS FOR OBJECTING TO AMENDMENTS TO THE PLEA

Introducing an excipiable pleading (paras 10.5 -10.7)

9. The Municipality's first objection is to the introduction in paras 10.5 to 10.7 of an allegation that Ergo and its "*predecessors in title*" at the E Plant were supplied with electricity by Eskom and that they had been supplied with electricity at another plant of theirs, which also fell within the area of the Municipality, in terms of a contract with Eskom. These were among the allegations made from which Ergo sought to draw two conclusions; firstly that the supply of electricity was "*accordingly"* excluded from the Municipality's licence at both plants and secondly that the Municipality was not licenced to supply or sell electricity in respect of the second plant. It is contended that these conclusions do not support a defence or that the allegations themselves are vague and embarrassing, and despite notice have not been cured.

10. It is evident that Ergo's proposed amendment is intended to answer the Municipality's allegation that an application by Ergo for the connection of the supply of electricity constituted a consumer agreement for the supply of electricity

as defined by the Electricity By-laws. It is also intended to raise the defence that if such an agreement was constituted then it is unlawful.

11. The defence as set out in the current plea is a rolled up one containing at best a denial that the written application constituted a consumer agreement.

    The proposed amendment is intended to be a plea in the alternative should the court find that the application form constituted an agreement. It comprises six subparagraphs which according to Ergo's heads of argument amount to a plea that such an agreement is unlawful and that this is substantiated by the allegations made in the subparagraphs 10.5 and 10.6.[4]

12. Subparagraphs 10.5 and 10.6 refer to a state of affairs which is alleged to have exited at all material times since the 1980s, where the defendant and its predecessors in title at the E Plant were supplied with electricity by Eskom, that they had also been supplied with electricity from Eskom at their other plant which also fell within the area of the Municipality and that such supply to this other plant was in terms of a contract.

    It is these averments which, according to counsel who drafted them, constitute the factual matrix from which the conclusion is sought to drawn in para 10.7 that the agreement, if proven, would in any event be unlawful.

    Para 10.7 reads:

    "*In the circumstances, the plaintiff was not licensed to supply or sell electricity to the defendant at the Ergo plant and the consumer agreement relied upon by the plaintiff was unlawful"*

[4] Para 8 of Ergo's heads

13. The allegations contained in para 10.5 and 10.6 would be relevant when considering whether the parties intended the application to constitute an agreement for the Municipality to supply electricity as envisaged by the legislation as opposed to it being a mere conduit between Eskom and Ergo. [5]

14. The allegations are also material to show that throughout the period relevant to a consideration of the applicable legislation, it was Eskom which supplied and sold electricity to Ergo at its plants which fell within the jurisdiction of the Municipality.

    As appears from the earlier judgment delivered during October 2019 in relation to the same subject matter, albeit brought on motion by Ergo against the Municipality for an interdict and declarators, the latter's right to sell, supply or distribute was dependent on the consumer not being an existing customer of Eskom. Moreover in the motion proceedings the Municipality has pertinently relied on a long standing relationship with regard to the supply of electricity between it and Ergo as well as Ergo's predecessors in title[6]. One can therefore anticipate that at the trial the Municipality itself will rely on the earlier relationships.

15. It is therefore evident that paras 10.5 to 10.6 are factual allegations intended to demonstrate that Schedule 1 to the licence NERSA (the National Energy Regulator of South Africa) issued to the Municipality which gives it the authority to supply electricity did not extend to Ergo and that any relationship that did exist was not one to which the Municipality's licence could extend.

    The relevant part of the Municipality's licence to supply electricity, as pleaded by Ergo in para 10.4 of its proposed amendment, reads " *Customers being supplied by Eskom or any other Licensed Distributor at the date of commencement of this licence are excluded from this licence."*.

---

[5] Paras 29 to 32 of the earlier judgment handed down in October 2019 explains the relevance of whether the relationship between the Municipality and Ergo was one of supplier in terms of the legislation or simply a convenient conduit, or a reseller, with Ergo being billed by the Municipality no more than the rate it would have been charged by Eskom directly.

[6] Judgement of October 2019 para 21

16. Accordingly the Municipality's objection that it is unclear how the supply of electricity at the other plant is relevant is answered on the basis that it is an allegation of fact on which Ergo intends to rely, both in support of its contention and to rebut the Municipality's case to the contrary.

    Pleading these alleged facts also avoids the risk of the Municipality contending that the allegations relied on did not form part of the pleadings and should not be admitted into evidence when the basis and rationale for the discussions and alleged agreement between the Municipality and Ergo's predecessors are sought to be led in evidence or dealt with in cross-examination. Whether the allegations carry any weight in the context of the evidence as a whole is a different matter which should be left for the trial judge to determine in due course.

17. Moreover it is the Municipality which first relied on its relationship with Ergo's predecessor in title to support its contentions. It cannot now be heard to say that it is irrelevant. More particularly when the date that the Municipality's licence commenced would have been at the time Ergo's predecessor in title owned the property where the plant is situated. In the earlier judgment I considered that the term *"customer"* in relation to both Eskom and the Municipality's licences could only mean the customer who owned or occupies the property in question and its predecessor or successor in title.[7]

18. In my view the first set of objections which relates to paras 10.5 to 10.7 cannot succeed.

Withdrawal of admission and excipiable as no defence raised or vague and embarrassing (para 13.2)

19. The Municipality alleges in its particulars that from the end of November 2014 the defendant made only partial payment in respect of each account and has failed, refused or neglected to make payment of the balance.

[7] Para 28 of October 2019 judgment

20. The current plea;

    a. denies a liability to pay any amount in respect of electricity charges levied against it "*in respect of electricity supplied to the property"* and refers to its counterclaim;

    b. states that from 30 November 2014 it has been paying "*to the plaintiff the amounts charged by Eskom to the plaintiff in respect of electricity consumed by the defendant"*

       Ergo alleges that it has done so in order "*not to enrich itself unjustly at the expense of the plaintiff"*

21. The amendment sought to be introduced raises an alternative defence if the court should find that Ergo is liable to pay any amount in respect of electricity supplied to the property. The proposed alternative plea avers that;

    a. The electricity was supplied in the absence of a consumer agreement between it and the Municipality;

    b. The permissible charges are limited to one under a particular By-law, identified as By-law 3(1) and referred to by the Municipality as section 3(1) of the By-law, which is no more than;

        i. the amount which the Municipality was liable to pay to Eskom for the electricity supplied; alternatively,

        ii. the amount which would have been due by Ergo to the Municipality had the premium in the latter's Tariff J been payable to it in respect of electricity consumed at the E Plant.

22. *Adv Hulley* for the Municipality contends that Ergo had accepted, when extracting an undertaking not to disconnect the electricity, accepted that it, Ergo, was challenging the existence of an agreement, not that in the absence of an

agreement the Municipality could charge no more than the amounts Ergo contend for in the proposed amendment.

23. I am afraid that I do not read the existing plea or the terms of the undertaking which was sought from the Municipality in that way. The undertaking was sought not on the basis of making a concession of any fact. The undertaking was sought on an insistence that if the Municipality did not provide it then Ergo would approach the court urgently to interdict the threatened cut off.

24. Moreover it cannot be contended that when Ergo sought the undertaking it was accepting that the Municipality may have had some right it could legitimately exercise to terminate the supply. It is evident that Ergo was not prepared to take the risk of approaching only Eskom to ensure that the supply of electricity was not interrupted since the Municipality had the physical ability to do so. But this did not amount to a concession that the Municipality had any legitimate entitlement to charge Ergo, at least in any amount greater than would have been payable to Eskom. In short, as *Adv Chaskalson* argued, the undertaking was sought because Ergo was concerned about the Municipality interfering with the supply of electricity to its plant, not Ergo's obligation to pay the amounts claimed by the Municipality; and this is evident from the terms of Francis J's order in that regard..

25. If regard is had to the manner in which Ergo has raised its defences both in the existing plea and the motion proceedings themselves it would be stretching the issue to leverage an admission of the nature sought. The number of subparagraphs that the Municipality's counsel found necessary to explain "*the substance of the municipality's complaint"* that there was a withdrawal of an admission speaks volumes- no less than five spanning two full pages. The argument is tenuous at best.

26. Finally, the issue is a real and live one which should be ventilated, particularly where there is a ready explanation dealing with seeking and obtaining the undertaking from the Municipality not to cut of the electricity supply.

27. The second complaint to the introduction of para 13.2 is that it fails to set out a proper defence in law or remains vague and embarrassing despite Ergo being given an opportunity to remedy the complaint.

28. The Municipality argues that the allegations which Ergo wishes to introduce are not borne out by s 3(1) of the By-laws read with ss 3(2) and 4(2).

29. However Ergo contends that s 3(1) is intended to deal with the theft of electricity, not the unique set of facts that this case presents. It also contends that the term "*cost*" on which the Municipality heavily relies is not the cost as charged to Ergo, particularly as there are a broad range of tariffs to which the term might be applied.

30. I would hesitate in making any findings one way or the other as I cannot be satisfied that some evidence may not be relevant or that all the permutations which may require to be considered have been, or can necessarily be addressed, at the pleading stage. I am however satisfied that the Municipality understands the issue and therefore is not prejudiced.

31. Accordingly the objection to this paragraph must also fail.

Excipiable pleading and contradictory averments (para 13.4)

32. Ergo also seeks to amend the allegation that the amounts it has paid since November 2014 for electricity consumed were made so as not to enrich itself.

33. The amendment wishes to add that such payments "*discharged any liability to the plaintiff imposed on it under By-law 3(1) of the Plaintiff's electricity By-laws"*.

34. The first objection repeats that raised in respect of para 13.2, namely that the By-law does not support the contention advanced. I have already indicated that broader issues of fact or law may be involved which defeats the raising of an exception.

35. The second objection is that the averment would contradict the principle denial that the plaintiff ever supplied electricity to the E Plant or that Ergo is liable to pay any sum to the Municipality in respect of charges levied by it for electricity supplied to that property.

36. I do not agree that the words sought to be introduced contradict para 12.1 of the plea. That paragraph is a denial that the Municipality is the supplier of the electricity consumed by Ergo while para 13 is concerned with whether or not there was an agreement or legislative obligation imposed on Ergo to pay the Municipality for its consumption of electricity. Ergo has never denied that it has consumed electricity; the issues are from whom, how that arose and at what cost.

37. I agree with Adv Hulley that the words sought to be introduced may be understood to contradict the denial of liability to pay "*any sum*" whatsoever in respect of electricity charges levied. I do not believe that the allegation sought to be introduced (that the payments made would be in discharge of a section 3(1) liability) are rendered compatible with para 13.1 of the Plea by simply prefacing the word *"liability*" with "*any"*.

    Ergo contends that the words sought to be introduced covers the primary defence raised in para 13.1, which is to the effect that Ergo never incurred a liability to pay any sum whatsoever to the Municipality[8]. I disagree.

38. I am reluctant to require an amendment, which inevitably will follow, where I believe it is possible to construe the word "*any liability"* to mean "*any liability that may be found by the court"*. Although it may not have been argued in this way, the implying such wording would provide the necessary internal limitation equivalent to the usual "*in the alternative"* formula.

39. I therefore agree that the words sought to be introduced are vague, but I consider the issue to be *de minimis* and that it is unnecessary to require a formal revision on the basis, as indicated in the previous paragraph, that the words "*that may be*

[8] Para 42 of Ergo's Heads.

found by the court" should be read into the proposed amendment immediately after the words "*discharged any liability"*.

GROUNDS FOR OBJECTING TO INTRODUCTION OF CLAIMS C AND D TO THE COUNTERLAIM

The issues

40. I mentioned earlier that the current formulation of Ergo's counterclaim, as set out is based on an unjustified enrichment claim and in the alternative a remedy based on the development of the common law in respect of such a remedy where constitutionally protected property rights are infringed by an organ of State. These have now been split into Claims A and B.

41. The proposed Claims C and D are pleaded in the alternative to the existing claims, and to each other. Their purpose is to introduce an allegation that the amount paid by Ergo to the Municipality exceeds the maximum amount which the Municipality is legally entitled to recover from Ergo should a court find that s 3(1) of the By-laws apply. Save for that, Claim C follows Claim A while Claim D follows Claim B.

42. The Municipality raised five objections:

    a. The exception previously raised in relation to the plea with regard to the correct interpretation of s 3(1) of the By-laws.

       I have already found that evidence and other legislation may be introduced which precludes the issue being decided on the narrow legal point raised by the Municipality in what amounts to an exception.

    b. The claims sought to be introduced are for amounts which arose more than three years ago and therefore have become prescribed;

c. Tariff J on which Ergo seeks to rely was not in existence at the relevant time

d. Certain amounts in Claim C and D are incorrectly claimed

e. Claim D lacks averments to sustain a cause of action or are vague and embarrassing

Prescription

43. The prescription point has two legs. Essentially the one is that the proposed amendments cannot piggy-back on the exiting claims in order to avoid the running of prescription as the *facta probanda* are different. The other is that even if they can, both they and the first set of claims have become prescribed.

44. Adv Hulley accepts that the proposed claims are also based on an enrichment action or a constitutionally based extension of one. He however argues that Ergo has introduced an essential fact that was not previously put forward and which has created a different "*right of action".*

45. In support of the submission reliance is placed on the leading case of *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F and 838D-H and 839F-G.

It is to be born in mind that the majority decision in *Evins* did not consider the judgment of Colman J in *Mazibuko* cited earlier. Trollip J in a minority concurring judgment did and said the following at 825F-826A :

> *"I prefer to use the term 'right of action' to 'cause of action' because, I think, the former is strictly and technically more legally correct in the present context (cf Mazibuko v Singer 1979 (3) SA 258 (W) at 265D - G).'Cause of action' is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the dependant's 'debt', the word used in the Prescription Act. The term, 'cause of action', is commonly used in relation to pleadings or in statutes relating to jurisdiction or requiring prior written notification of*

a claim before action thereon is commenced. But it is not used in either the CMVI Act or the Prescription Act. And its use in the present context may possibly lead to erroneous reasoning. For in claims in delict for damages under the common law or for compensation under the CMVI Act, I am not sure that it necessarily follows that, because one factual basis differs from another in some respect or respects, separate or different rights of action arise; on the contrary, both cases may nevertheless beget only one right of action or debt, eg one for the plaintiff's entire patrimonial loss. The cases of Green v Coetzer 1958 (2) SA 697 (W) and Schnellen v Rondalia Assurance Corporation of SA Ltd 1969 (1) SA 517 (W) - if they were correctly decided - are apposite illustrations of that.
In the latter kind of cases problems, similar to those mentioned in the judgment of Corbett JA, could also arise."

46. Moreover the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA) at 827I approved the passage just cited of Trollip JA, applied *Mazibuko* and expressly adopted the following statement by Colman J at 266B-C:

"The question to be asked, therefore, is this one: ``Did the plaintiff, in the earlier process, claim payment of the same debt as now forms the subject-matter of the claim which is said to be prescribed?'' If the answer is in the affirmative, prescription has been interrupted, even if one of the grounds upon which the claim is now based differs from the ground or grounds relied on at the earlier stage.'"

This had followed on from the following statement by the court in *Oneanate* at 826 G-H:

"The real question which arises is whether the subsequent pleading is inconsistent with the claim proffered in the initiating summons. In the instant case I can see no inconsistency between what is averred in the plaintiff's amended declaration of June 1993 and what is averred in its simple

summons. The plaintiff's declaration as finally amended indicates that the plaintiff was seeking to enforce the same debt referred to in its simple summons or a debt which is cognisable in the simple summons. The amendment merely clarified or added details which do not appear in the simple summons."

47. The fact that a counterclaim is not couched in a simple summons type form should not detract from the point. A *"debt"* for purposes of the Prescription Act is not as limiting in scope as either the concepts of "*cause of action"* or the "*facta probanda"* if that is strictly construed to mean all the facts on which the claim relies.

Ergo has raised a basic enrichment claim under the *condictio sine causa* which requires no more than an allegation that a payment was made by the plaintiff to the defendant in error without just cause[9], extending it only as a matter of law by reference to constitutionally protected rights to property against an organ of State- but this was already raised in the alternative Claim B.

The label in the present case is founded on an enrichment claim based on the mistaken belief that it was owing. Although the onus is on the claimant to demonstrate the mistaken belief it is really the other party who raises the justification. The position of Ergo remains consistent; both the existing and proposed counterclaims are based on the Ergo not being obliged to pay the Municipality any amount, but if there was any liability then it could be no more than the amount Eskom would have charged Ergo directly, or at best a permutation of that- accordingly any amount paid in excess must be repaid to it under an enrichment action. The debt remains nonetheless substantially the same debt.

48. In the other case relied on by the Municipality of *De Kock v Middelhoven* 2018 (3) SA 180 (GP) the court at para 26 said the following:

---

[9] Harms *Amler's Precedents of Pleadings* – under the headings "*Condictio sine causa"* and "*Enrichment"*

'Therefore, in order to establish whether the causes of action are similar or different, one merely has to look at the facts that a litigant has to prove in order to succeed with his or her claim. Once the facta probanda are different, then the causes of action can never be the same.'

49. Unfortunately the court was not referred to *Oneanate,* its adoption of Trollip J's approach in *Evins* or its acceptance of *Mazibuko* and the distinction to be drawn between a "*cause of action*" and a "*right of action*" for the purposes of determining the meaning to be attributed to a "*debt*" under the Prescription Act. The very situation with which *Oneanate* was concerned is one where not all the *facta probanda* were alleged; only the label to which the debt is to be attributed.

The court was also not referred to the judgment of *Erasmus* which had considered a number of cases in reaching the conclusion that a claim in contract could be supplemented with an alternative one in delict. The effect is that the amended pleading would require the introduction of facts supporting causation and possibly a duty of care (in cases where the duty did not flow naturally) which are unnecessary factual elements in a purely contractual claim.

Oneanate was overruled by the Constitutional Court on a different point in *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC). However its *ratio* on the issue under consideration has been consistently applied, as has *Mazibuko*[10]*.* See for instance *Unilever Bestfoods Robertsons (Pty) Ltd and others v Soomar and another* 2007 (2) SA 347 (SCA) at para 18 and *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at paras 5 and 6. In *CGU* the plaintiff had initially relied on a different contract which would amount to a different cause of action and different *facta probanda* yet the SCA found that the debt remained the same for the purposes of prescription.

50. Another illustration where the *facta probanda* would be different but the debt remains the same for purposes of prescription is *Groter Johannesburgse*

Oorgangs Metropolitaanse Raad v Schwartz 2002 (5) SA 584 (T) a full court decision which upheld the decision of du Plessis J (reported in 2001 (2) SA 1014 (T)).The court a quo applied *Mazibuko* and the full court endorsed the finding that amending a claim to allege the negligence of the owner of the bus as opposed to the driver based on different acts of negligence and a different duty did not amount to a different debt. This was because the amount claimed still arose by reason of a collision with the bus. In the present case the amount claimed arose by reason of an alleged mistaken payment based on there being no lawful duty to pay because the Municipality had no lawful right to charge anything more than the amount Eskom could have charged Ergo, or a permutation of that.

At best the proposed amendment may result in Ergo reducing the amount of its original enrichment claim should the court find that the Municipality was entitled to charge Ergo some amount directly by reason of some deeming legislation.

51. Accordingly if the claims made by Ergo constitute a *"debt"* for the purposes of the Prescription Act, and this is not conceded by Ergo, then I am bound by the *ratio* of the Appellate Division and the Full Court which, irrespective of the language used, all support and have applied the fundamental propositions explained in *Mazibuko.*

It also becomes unnecessary to consider the other technical and procedural arguments raised by Adv Chaskalson on behalf of Ergo.

52. Whether Claims C and D are for recovery of a debt as envisaged under the Prescription Act (*vide* Makate v Vodacom Ltd 2016 (4) SA 121 (CC), or arising from appropriation or some other grounds excluding the application of the Prescription Act, need not be considered at this stage: The Municipality has already raised a special plea of prescription to the existing counterclaims and there is no good reason why the prescription pleas to all Ergo's claims should not be heard before the same judge, if only to avoid the risk of different outcomes.

Tariff J

53. Ergo calculates the amount overpaid by reference inter alia to the Municipality's Tariff J. the Municipality contends that Tariff J did not exist at the relevant time. In my view this is a matter for the Municipality to plead. It certainly was not common cause as to when Tariff J came into existence.

54. The Municipality argues that Ergo should have alleged that the Tariff was in existence at the time. I believe that this is necessarily inferred.

55. If as a fact Ergo is wrong then it is for the Municipality to plead as much

Certain amounts in Claim C and D are incorrectly claimed

56. The Municipality objected to a number of calculations which it contends cannot be aggregated.

    These have been conceded by Ergo. For sake of completeness: In para 63.1 of Claim C and para 69.3 of Claim D the words "*and/or"* are to be replaced with "*alternatively"*; similarly at the end of prayers (i) and (iii).

Claim D lacks averments to sustain a cause of action or are vague and embarrassing

57. The difficulty facing Adv Hulley is that the issue of whether the enrichment claim based on the *condictio sine causa* differs from the constitutionally developed enrichment action contended for by Ergo is that it raises the long standing legal debate as to whether there is a *numerous clausus* of *condictiones* and if not, how it is to be developed as we do not recognise a general enrichment action.
58. In my view the resolution of this issue without having regard to the facts as ultimately proven may lead to a determination of a broad principle when what is called for at this stage is a more cautious casuistic approach, particularly since novel constitutional considerations are sought to be introduced into a *condictio* under the common law.

59. I have already identified the differences between the various claims (both existing and proposed) which leaves for consideration, I believe, only the point that there are insufficient factual averments or that they are vague.

    I do not share that view. Ergo has set out the facts which it believes are adequate to support the relief sought. The pleading of a *condictio* is relatively straight forward as appears from the reference to *Amler* cited in an earlier footnote. In any event most of these facts have already been pleaded in the existing counterclaim without demur.

COSTS

60. I subsequently realised that the question of costs has not been dealt with. It is preferable to insert it into the main body of the judgment.

61. Ergo relies on *Rabinowitz v Van Graan and others* 2013 (5) SA 315 (GSJ) at para 45 in support of the general proposition that costs should be awarded to the successful party since a *"bona fide amendment with the object of ventilating the real issues between the parties must be allowed. The party choosing to contest issues is expected to decide at its own risk whether or not to declare battle"*.

62. The Municipality refers to a few occasions where Ergo was compelled to make concessions and, relying on *Grindrod (Pty) Ltd v Delport and others* 1997 (1) SA 342 (W) at 347C, contends that since the opposition to the amendments was *"reasonable and not vexatious or frivolous"* it should be awarded the costs. *Grindrod* is premised on the proposition that an application for an amendment is above all one seeking an indulgence. It is unnecessary to consider whether that is necessarily the single most important factor when a proposed amendment is opposed; there being a significant difference between the additional costs incurred as a consequence of acceding to an amendment with the need to address the revised pleading, consult and deliver a consequential amendment on the one hand and engaging in a full blown opposed application on the other.

63. While the amendment was not vague, save to the extent mentioned earlier, I certainly believe that I gained a better understanding of the full import of the case,

issues and subtleties that will have to be grappled with at the trial. It most probably has also contributed to each parties understanding of the formidable task that may lie ahead for both in trial preparation.

Finally, although the challenge to the additional counterclaims on the ground that they cannot piggy-back on the existing claims to avoid prescription was unsuccessful, there was always the risk that if the point had not been taken at this stage then the Municipality may have been criticised for not doing so and been deprived of significant costs if a trial court had considered the point to be good.

64. I am of the view that overall the interests of both parties has been served by engaging in this process. In the exercise of my discretion and for the considerations mentioned, the appropriate order is that costs should be in the cause.

ORDER

65. It is ordered that:

1. *The application for leave to amend is granted*

    a. *and that the words "that may be found by the court" are to be read immediately after the words "discharged any liability" in para 13.4 of the amended Plea*

    b. *save that the words "and/or" are to be replaced with "alternatively" in;*

        i. *para 63.1 of Claim C and para 69.3 of Claim D;*

        ii. *at the end of prayers (i) and (iii)*

2. Costs to be in the cause

(SIGNED)

_____

SPILG, J

DATE OF JUDGMENT	8 June 2020
FOR APPLICANT	Adv Chaskalson SC
	Adv A Williamson
	Mendelow-Jacobs Atto4rneys
FOR FIRST RESPONDENT	Adv G1 Hulley SC
	Adv JC Uys
	Klopper Jonker Attorneys
FOR SECOND RESPONDENT	Adv NH Maenetje SC
	Adv ALS Msimang
	Nyapotse Inc