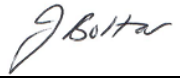
IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION JOHANNESBURG)

Case Number: 2015/24887

REPORTABLE	NO
OF INTEREST TO OTHER JUDGES	NO
REVISED	28 OCTOBER 2020
SIGNATURE	

In the matter between:

NEDBANK LIMITED Applicant/Plaintiff

and

RVI CONSULTING CC First Respondent/Defendant

NAGEL, CORA VANESSA Second Respondent/Defendant

JUDGMENT

HEARD REMOTELY VIA TEAMS PLATFORM

JT BOLTAR AJ

INTRODUCTION

1. In 2015 the Applicant ("Nedbank") issued a summons in which it claimed payment from the Respondents of R200 400. Nedbank

contends that this amount was advanced to the First Respondent ("RVI") on overdraft.

2. The Respondents filed a notice of intention to defend and Nedbank brought a summary judgment application. That application was unsuccessful and, in December 2015, the Respondents filed their plea.

3. In May 2020, Nedbank notified the Respondents that it intends to amend its particulars of claim in terms of Uniform Rule of Court 28(1), by replacing them with the particulars of claim attached to Nedbank's Rule 28(1) notice. The Respondents objected and Nedbank seeks an order that it be allowed to amend its particulars of clam under Rule 28(4).

FACTS

4. It is common cause that RVI opened a current account with Nedbank, that in 2011 Nedbank approved a R200 000 overdraft facility for RVI on that account (the "Original Overdraft Facility") and that in 2010 a suretyship was signed by the Second Respondent (the "Original Suretyship"). The Original Suretyship bound the Second Respondent as surety for the repayment by RVI of any

amount owed to Nedbank (subject to the amount recoverable from the Second Respondent not exceeding R200 000).

5. It is also common cause that RVI subsequently applied to Nedbank for an increase to RVI's overdraft limit of R200 000 and that Nedbank increased that limit to R550 000 (the "2013 Overdraft Facility"). A written agreement referring to an "*Overdraft facility*" of "*R550 000.00 with a once off reduction on 10/05/2013 back to R200 000.00"* was signed on 7 May 2013. This agreement (the "2013 Overdraft Agreement) is attached to Nedbank's current particulars of claim and the correct interpretation of its terms are in dispute.

6. In May 2013, a second deed of suretyship was signed by the Second Respondent (the "2013 Suretyship"). The 2013 Suretyship bound the Second Respondent as surety for the repayment by RVI of any amount owed to Nedbank (subject to the amount recoverable from the Second Respondent not exceeding R550 000). The 2013 Suretyship is attached to Nedbank's current particulars of claim and the correct interpretation of its terms are in dispute.

7. On or about 10 May 2013, RVI paid R350 000 to Nedbank. The effect and nature of that payment is in dispute.

THE AMENDMENT

8. In its current particulars of claim, Nedbank alleges that RVI's current account became overdrawn, that Nedbank is consequently entitled to claim immediate repayment of the amount owed by RVI in terms of that account, and that the amount owed by RVI *"in terms of the current account is the sum of R200 400.02 together with interest thereon …".* If Nedbank is allowed to amend its particulars of claim, those allegations will also be contained in its new particulars.

9. The current particulars of claim state that RVI conducted the current account pursuant to the 2013 Overdraft Agreement and that the Second Respondent signed the 2013 Suretyship. If Nedbank is allowed to amend its particulars, its new particulars will state that the overdraft facility provided by it to RVI was the 2013 Overdraft Facility, alternatively the Original Overdraft Facility. In addition, such particulars will state that the Second Respondent is a surety in terms of the 2013 Suretyship, alternatively the Original Suretyship. The 2013 Overdraft Agreement and the 2013 Suretyship, both of which are attached to Nedbank's current particulars, will be attached to the new particulars. The new particulars will also attach the Original Suretyship, which is not attached to the current particulars.

10. The Respondents contend that the amendment would result in the introduction of a new cause of action that has prescribed and should consequently not be allowed.

LEGAL PRINCIPLES

11. The principle is well-established that amendments ought to granted where a refusal of them "*defeats the objective of allowing an amendment, which is to secure proper ventilation of the dispute between the parties and to determine the real issues between them, thereby doing justice*."[1] In *Randa v Radopile Projects CC*[2] the Court agreed with the following observation of Greenberg J in *Rosenberg v Bitcom*:[3]

> *"Although it has been stated that the granting of the amendment is an indulgence to the party asking for it seems to me that at any rate the modern tendency of the Courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties."*

12. In principle a new cause of action can be added by way of an amendment where that is necessary to determine the real issue between the parties.[4]

---

1 *Nedcor Investment Bank Ltd v Visser NO and Others* 2002 (4) SA 588 (T) at 595-6.

2 2012 (6) SA 128 (GSJ) at para [33].

3 1935 WLD 115 at 117.

4 *Meyers v Abramson* 1951 (3) SA 438 (C) at 449-450; *Nedcor Investment Bank Ltd v Visser NO and Others supra* at 595.

13. In *CGU Insurance v Rumdel Construction*[5] Jones AJA held that it is a *"sound premise that an amendment is permissible provided that the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed"* and *"it does not follow that by curing a defective cause of action by introducing the contract upon which it really relies, the plaintiff's summons necessarily claims a different debt"*. He went on to state:[6]

> *"I accept that the amendment introduces a new insurance contract as the basis for the claim for the loss which occurred in March 1996. But an objective comparison between the original particulars of the claim and the particulars of claim as amended leaves me in no doubt that although part of the cause of action is now a different contract, the debt is the same debt in the broad sense of the meaning of that word. The original pleadings convey, in that broad sense, that the debt was payable by reason of a contractual undertaking to indemnify the plaintiff for the loss which occurred in March 1996, a loss which is fully particularised and of which notice was allegedly given after the occurrence as required by the policy. That is also how it is described in the amendment. I can find no grounds for concluding in this case that a change in the contract relied upon means that a different debt was claimed."*

14. During the hearing, counsel for the Respondents confirmed that they do not contend that Nedbank was *mala fide*. Therefore, the amendment sought by Nedbank should be allowed if it would not change the debt claimed by Nedbank in its current particulars or the subject matter of Nedbank's claim against RVI. In this regard, a distinction must be drawn between the debt claimed by Nedbank

---

[5] 2004 (2) SA 622 (SCA) at para [5].

[6] At para [8].

and a cause of action. That distinction was drawn by Jones AJA in the following passage from his judgment in *CGU Insurance*:[7]

> "… 'debt' in the context of s 15(1) [of the Prescription Act, 68 of 1969] must bear 'a wide and general meaning'. It does not have the technical meaning given to the phrase 'cause of action' when used in the context of pleadings (*Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)*). In *Evins v Shield Insurance Co Ltd* Trollip JA made a point of the distinction between 'debt' and 'cause of action', and describes the latter in the following way:
>
> > "'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 defendant's 'debt'', the word used in the Prescription Act."
>
> The debt is not the set of material facts. It is that which is begotten by the set of material facts. This Court has, furthermore, recently considered the meaning of the word 'debt' in the Prescription Act on a number of occasions. In *Drennan Maud & Partners v Pennington Town Board* Harms JA again emphasised that 'debt' does not mean 'cause of action', and indicated that the kind of scrutiny to which a cause of action is subjected in an exception is inappropriate when examining the alleged debt for purposes of prescription. In *Provinsie van die Vrystaat v Williams NO.* Olivier JA warned against the danger of being misled by cases which fail to distinguish properly between the debt and the cause of action upon which it is based. See also the *Sentrachem Ltd* case *supra* and *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit (supra*)."

15. The debt claimed by Nedbank in its current particulars is the amount of R200 400 which it contends it advanced to RVI on overdraft and is owed by RVI in terms of the current account. The amendment would not change that debt, nor would it change the subject matter of Nedbank's claim against RVI. The real dispute between the parties is whether the First Respondent is liable to pay the R200 400

---

[7] Supra at para [6].

that Nedbank contends it advanced on overdraft and is owed by RVI in terms of the current account and, if so, whether the Second Respondent is liable for that payment under a suretyship. The proper ventilation of that dispute would be facilitated by the amendment.

16. The amendment will result in Nedbank's particulars of claim stating certain facts that it contends brought about the alleged debt in the alternative. That does not render the particulars of claim excipiable and is not a basis for refusing the amendment.

17. There is no prejudice to the Respondents caused by the amendment which cannot be compensated for by a costs order. The fact that an amendment may cause a party opposing it to lose their case is not the kind of prejudice which will dissuade a court from granting the amendment.[8] In addition, delay in seeking an amendment is not a reason to refuse it.[9] The Respondents have the opportunity to gather such further evidence that they deem necessary to prove they are not liable for the R200 400 claimed by Nedbank, and the amendment will not deprive them of the opportunity to raise a plea of prescription in respect of that alleged debt.

---

[8] *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 294; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 615.

[9] *Trans-Drakensburg Bank Ltd v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 at 642 (D); *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 566.

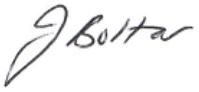
18. Consequently, the amendment sought by Nedbank is allowed.

19. The granting of an amendment is an indulgence to the party seeking it. In terms of Rule 28(9) the general rule is that such party is *"liable for the costs thereby occasioned to any other party"*. There is no reason to depart from this general rule in this application.

20. The following order is made:

20.1 The application is allowed and the Applicant's particulars of claim are amended by replacing them with the particulars of claim attached to their Rule 28(1) notice.

24.2 The Applicant is to pay the costs occasioned by the amendment, including the costs of this application.



_____

JT BOLTAR AJ

28 October 2020

Date of Hearing: 26 October 2020

Judgment Delivered: 29 October 2020

APPEARANCES;

On behalf of the Plaintiff:	M Reineke
Instructed by:	DRSM Attorneys
On behalf of the Defendants:	B Savvas
Instructed by:	Hesselink Konig Inc