

REPUBLIC OF SOUTH AFRICA

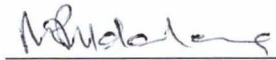


IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28845/2019

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

21 May 2021



In the matter between:

VFT AUTOMOTIVE (PTY) LTD

Plaintiff

and

ABSA BANK LIMITED

Defendant

JUDGEMENT

1. This judgment deals with an application for an amendment of the particulars of claim of the plaintiff. The plaintiff has instituted an action against the defendant. The summons was issued on 16 August 2019. The defendant is defending the action and has filed notice of intention to defend on 5 September 2019. The

defendant objected to the formulation of the plaintiff's cause of action or of the particulars of claim by delivering an exception in terms of Rule 23 of the Uniform Rules of Court. Rule 23 provides a useful mechanism to a party in the action to except to a pleading which is vague and embarrassing or which lacks averments which are necessary to sustain a cause of action or defence.

2. In practice, the excipient must first give notice to the other party to remove the cause of complaint within specified number of days failing which the exception will be delivered. In this case, the plaintiff reacted to the notice of exception by attempting to remove the causes of complaint and in terms of Rule 28(1) of the Uniform Rules of Court delivered notice of intention to amend furnishing the particulars of the amendment. It appears there was no objection to the amendment in terms of Rule 28(3) which permits a party objecting to the proposed amendment to a notice of objection stating the grounds upon which the objection is founded. Since no objection was filed, the plaintiff acting in terms of Rule 28(2) effected the amendment by delivering amended pages.
3. On 14 November 2019, the defendant delivered a further notice of exception in terms of Rule 23 raising certain causes of complaint to the duly amended pages (amended particulars of claim). In response to the notice of exception delivered on 14 November 2019, the plaintiff again acting in terms of Rule 28(1) of the Uniform Rules, delivered notice of intention to amend its particulars of claim (amended particulars of claim) on 12 December 2019. On 18 December 2019, the defendant, acting in terms of Rule 28(3) delivered a notice of objection to the proposed amendment.

4. As it is required by Rule 28(4), which provides that if an objection which complies with sub-rule (3) is delivered within the period referred to in sub-rule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend. The plaintiff lodged an application for leave to amend which was subsequently argued before me.
5. I considered the particulars of claim in their original form, the first amended pages, and the proposed second amendment which is the subject of the objection. I also considered the applicant's heads of argument and the applicant's revised heads of argument, as well as the respondent's heads of argument and authorities relied by both parties.
6. Before I deal with the legal principles that underpin amendments generally, I set out briefly what the plaintiff's particulars of claim in their amended form state before the proposed amendment was formulated. The plaintiff is a private company duly registered in accordance with the laws of the Republic of South Africa and the defendant is a registered bank also incorporated in accordance with the laws of the Republic of South Africa. On 20 February 2015 the plaintiff and the defendant entered into a written ABSA Bank floor plan facility. In paragraph 4 of the particulars of claim, it is pleaded as follows:

“(4) The expressed alternatively implied or tacit terms of POC1 provided inter alia as follows:

- (a) the floor plan facility was for the sum of R16 million in respect of used motor vehicles;*
- (b) the interest rate applicable to the facility was the defendant's prime rate from time to time;*

- (c) *the facility was renewable annually;*
- (d) *the payment frequency was 180 days on used vehicles or on the sale of vehicles;*
- (e) *the review date was 29 February 2016;*
- (f) *the plaintiff was required to provide the defendant with security to its satisfaction which security would include tangible security in the sum of R1 600 000.00. The nature of this security was to be discussed between the plaintiff and the defendant;*
- (g) *the defendant was entitled to conduct 2 floor plan inspections per month;*
- (h) *vehicle sold on the floor plan facility had to be settled by the plaintiff within 48 hours;*
- (i) *all vehicles had to be comprehensively insured. The plaintiff was required to supply the insurance company name being Mutual and Federal and policy number 18239250.*
- (j) *the conditions in the facility letter could change at the discretion of the defendant;*
- (k) *all vehicles placed on the floor plan were to be dealer stocked in the defendant's name as titleholder and the plaintiff as owner;*
- (l) *on the termination of the floor plan facility the defendant would pay to the plaintiff any monitory amount held by the defendant to the credit of the plaintiff as security for the floor plan facility."*

7. In paragraph 8 of the particulars of claim, the plaintiff has pleaded as follows:
- "on 24 August 2015, and at Johannesburg, the defendant represented by E V Mania and Bronson Colan, in writing offered Fire Wings Property (Pty) Ltd ("Fire Wings") a commercial mortgage backed facility in respect of banking facilities in the sum of R6 600 000.00 ("the fire wing facility)". It is pleaded in paragraph 10 that the express terms of the commercial mortgage backed facility, which*

has been attached as POC2, provided that the defendant would implement the fire wings facility on the signature by Fire Wings of the relevant documents.

8. In paragraph 11, the plaintiff pleads another agreement, in this instance a written commercial loan agreement concluded on 21 April 2016 between the defendant and Fire Wings.
9. The terms of the agreement aforesaid are pleaded in paragraph 13 of the particulars of claim as follows:

"The expressed alternatively implied or tacit terms of annexure "PO3" provided inter alia as follows:

- 13.1 *the Fire Wings facility would be for an amount of R6 600 000.00 which was made up of a maximum aggregate amount of R5 million plus a retention amount of R1 600 000.00;*
- 13.2 *the amount of R1 600 000.00 forming part of the total R6 600 000.00 Fire Wings facility (which was to be secured by the aforementioned security board) was not capable of being drawn on by Fire Wings and was to remain a retention (as available as security) for the amounts due by the plaintiff to the defendant under its floor plan facility; (Clause 10.2.1)*
- 13.3 *the plaintiff was to open a transactional account with the defendant within three months from the date of the acceptance of the Fire Wings facility, failing which the interest rate would increase by a further 200 basis points. (clause 10.2.7)"*

10. It is pleaded further in paragraph 14 that pursuant to the conclusion of the loan agreement the defendant caused a mortgage bond to be registered over the property. In paragraph 15, the plaintiff pleaded further that on 27 October 2016

the defendant in writing offered the plaintiff a new ABSA Bank floor plan facility.

The terms are set out in paragraph 16 as follows:

“(16) The express alternatively implied terms of the floor plan facility offered to the plaintiff provided inter alia as follows:

16.1 the mount of the floor plan facility was R16 million for used motor vehicles;

16.2 the review date of the facility was 9 August 2017;

16.3 annexure POC5 recorded that the defendant held security in the form of a reservation of R1 600 000.00 of a registered bond of R9 million over the property.”

11. It is pleaded in paragraph 17 that the plaintiff accepted the new floor plan facility on 20 December 2016. The plaintiff made use of the floor plan facility and annexure POC5 is attached as evidencing the floor plan facility. It is pleaded in paragraph 19 that the express terms of POC5 provided that the reservation of R1 600 00.00 in respect of the mortgage bond registered over the property would constitute security in respect of the ABSA floor plan facility that would become reviewable on 9 August 2017.

12. In paragraph 20, the plaintiff pleaded that:

“(20) At the time of approval of the ABSA floor plan facility evidenced by annexure POC5:

20.1 the plaintiff held the sum of R1 600 000.00 in a bank account in the plaintiff's name in the circumstances referred to in paragraph 6 supra;

20.2 *the defendant had granted Fire Wings a loan facility duly secured by a mortgage bond over the property in the sum of R6 600 000.00;*

20.3 *the terms of the loan facility provided that Fire Wings would only be allowed to draw down on the facility in the sum of R5 million and that the balance of R1 600 000.00 was to be retained as security for the plaintiff's floor plan facility granted to it by the defendant from time to time;*

20.4 *the mortgage bond was registered over the property on 12 February 2016 of which an amount of R1 600 000.00 was retained (reserved) by the defendant as security for the amount owed by the plaintiff to the defendant under the floor plan facility conducted by it with the defendant.*

20.5 *the ABSA Bank floor plan facility was reviewable by the defendant on 9 August 2017."*

13. It is pleaded in paragraph 21 that the ABSA floor plan facility as evidenced by POC5 included the following terms:

"21.1 That the R1 600 000.00 held by the defendant in the plaintiff's name in the circumstances referred to in paragraph 6 supra will be paid by the defendant to the plaintiff on termination or cancellation of the ABSA floor plan facility for whatever reason."

14. It is averred further that plaintiff continued to use the ABSA floor plan facility until 2 January 2019 on which the plaintiff by way of email notified the defendant that the plaintiff was cancelling the facility and the plaintiff's access to the facility was forthwith terminated by the defendant. The plaintiff does not owe any money on the ABSA floor plan facility and it is pleaded that despite the termination of the ABSA floor plan facility the defendant has failed to repay the plaintiff the sum of R1.6 million that it holds as security for the ABSA floor plan facility that was previously conducted by the plaintiff. The plaintiff seeks a

declaratory order that the defendant holds the sum of R1 600 000.00 in the name of and to the credit of the plaintiff, payment by the defendant to the plaintiff of the sum of R1 600 000.00 with interest a tempore mora at the rate of 10% per annum until date of final payment and costs.

15. What is before me for consideration is the objection to the proposed amendment that I have referred to above. For easy reference for me, the amended particulars of claim for which leave of the Court is sought have been submitted and the portions that sort to be amended have been underlined for the Court's convenience. This indeed has made it easy for the Court to follow and to identify with ease those portions which are sought to be introduced as amendments or further amendments to the particulars of claim in order to deal with the objections raised by the defendant. I will not reproduce the underlined portions in the proposed amendment but I would rather deal with them in the context of the objection filed by the defendant.
16. In its notice of objection dated 18 December 2019, two objections have been raised by the defendant. The first objection essentially is to the effect that the plaintiff seeks to introduce Fire Wings on the basis that it provided security in favour of the plaintiff for the latter's indebtedness owed to defendant. It is stated that nowhere in the proposed amendment does the plaintiff plead the basis upon which the security in the Fire Wings facility could and would be used as security and or an investment in favour of the plaintiff. Instead, and in the proposed amendments to paragraphs 13 and 14 of the particulars, the plaintiff has pleaded the registration of a mortgage bond over a property owned by Fire

Wings 21 (Pty) Ltd. It is contended that that renders the particulars of claim in the proposed amendment vague and embarrassing. The plaintiff has attached annexure "X" to his proposed amendment which the defendant contends that presumably it is a cession agreement between itself and Automaniac CC, whereby the latter allegedly ceded all rights, title and interest in the sum of R1 600 000.00 which was allegedly invested by the latter with the defendant (the cession). Despite pleading the cession in the notice of amendment at paragraph 5(B) to 5(D), the plaintiff fails to rely on it for return of the R1 600 000.00 but instead relies upon annexures POC3 and POC5 which documents demonstrate that the R1 600 000.00 was not a deposit but rather a portion of unutilised credit advanced. The defendant avers that there are contradictions between the current reliance upon cession and the retention sum and that this will render the particulars of claimant expiable and therefore objectionable.

17. The second objection is that the plaintiff's cause of action pleaded in the notice of intention to amend (proposed amendment) lacks the averments necessary to sustain a cause of action. The reasons advanced are that, in order to support the contention that the sum of R1 600 000.00 shall be returned to the plaintiff, the plaintiff relies upon the cession; the Fire Wings facility; the October 2016 facility. The defendant states that the plaintiff pleads at paragraph 21.1 that the sum of R1 600 000.00 would be returned on termination of the October 2016 floor plan facility thereby implying that it constitutes a deposit or investment made. The defendant states that the documentation relied upon by the plaintiff in the notice of amendment expressly provides that the R1 600 000.00 was a

retention amount that formed part of the R6.6 million credit advanced to Fire Wings. It is alleged that nowhere in the Fire Wings facility agreement, nor in the mortgage bond registered in favour of the defendant as security by Fire Wings to the defendant, is it extant that Automaniac, Fire Wings and or the plaintiff would become entitled to the sum of R1 600 000.00 upon expiration of their respective contractual relationships with the defendant nor is any plausible event pleaded that could be interpreted as a trigger to such entitlement.

18. It is stated that on the contrary, it appears that R1 600 000.00 was part and parcel of the R6.6 million drawdown facility that was available to Fire Wings and that the latter was only permitted to draw down to a maximum some of R5 million so as to ensure that the full facility sum was not utilised. The defendant states that there is a disconnect between that which has been pleaded by the plaintiff and the prescribed terms of the document relied upon is indicative of the lack of the cause of action contended for. And the defendant submission is that permitting the proposed amendment would therefore render the particulars of claim excipiable for want of any averments necessary to sustain a cause of action against the defendant and that the objection should be upheld.
19. In their respective heads of argument, counsel of both parties are not at odds with authorities that underpin the principles applicable to amendment of the pleadings. The principles underpinning amendment of pleadings in terms of Rule 28 are set out in the plethora of case law. In essence, a party to action is permitted to amend its pleadings at any stage before judgment. This is however not a blanket right given to a litigant. The consideration as to whether an amendment should be granted when it is objected to is one of prejudice that

cannot be cured by an order of costs, or that the proposed amendment would render the pleading excipiable for want of cause of action or render it vague and embarrassing. Primarily the question is whether the other party would be prejudiced at the trial by the amendment or the amendment would make it impossible for the other party to plead for the vagueness or lack of coherence and lucidity of the pleading.

20. In *Trope vs South African Reserve Bank 1993 (3) SA 264 (A)* at 272 (A), the trite principles for amendment of pleadings was set out. In essence, pleadings must be drafted in a lucid, logical and intelligible manner. The cause of action shall appear clearly from the factual allegations made. The plaintiff has dealt with the two objections raised by the defendant in its heads of argument. The plaintiff has correctly set out the law and reference to *Moolman vs Estate Moolman 1927 CPD 27*, and *Trans Drakensberg Bank Ltd vs Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D)*. I agree with the principles underlined in the judgments and as correctly postulated by the plaintiff in the heads of argument. However, it is not only *mala fide* that determines whether an amendment should not be allowed, but prejudice to the other party is a relevant consideration. The prejudice must be manifest and not capable of being cured by an adverse costs order.
21. It is correct that an amendment will be allowed if it raises a triable issue. An amendment will also be allowed if it would provide a full ventilation of the issues that are sought to be ventilated before the Court. An amendment which would render the pleading excipiable, to be vague and embarrassing or to lack cause of action is prejudicial to the other party.


22. The plaintiff's submission is that the first objection should not be sustained because the pleading of the Fire Wings transaction forms part of a chronological narrative. With regard to the cession by Automaniac CC to the plaintiff of Automaniac CC's R1.6 million investment the plaintiff submits that the defendant's complaint fails to recognise certain fundamental principles of law and that it ignored the facts expressly pleaded in paragraph 6.
23. In respect of the second objection, the plaintiff submits that objection is unclear. That the objection is premised on an interpretation of the plaintiff's cause of action which is incorrect. The Court considering whether an amendment should be allowed is in the same position as a Court that considers an exception to a pleading. The Court should not take into account extraneous factors. The Court should read the pleading particularly where the only pleading filed is the particulars of claim, as if the averments in the particulars of claim are true. Inherent contradictions in a pleading render the pleading vague and embarrassing, and in certain instances not to have a cause of action.
24. The defendant's objection is that the proposed amendment would render the pleading excipiable. With regard to the introduction of Fire Wings facility, the plaintiff has first pleaded that it concluded a floor plan facility in 2015 with the defendant and that in terms of such facility, tangible security in the sum of R1.6 million was required. The plaintiff refers to Automaniac CC which retained an investment with the defendant which was ceded to the plaintiff for purpose of complying with the security provision in the 2015 floor plan agreement.

25. In paragraphs 8 to 14 the plaintiff pleaded that the agreement was concluded with a different entity namely Fire Wings and that it was in terms of this latter facility with an unknown third party (Fire Wings who is discreet from the plaintiff) that an amount of R1.6 million was retained as security for the purposes of the 2015 floor plan facility. The defendant submits that these allegations are mutually destructive because on the one hand, it was pleaded that the security for the 2015 floor plan facility was secured through the cession proffered by Automaniac CC and on the other hand it is pleaded that it was the Fire Wings facility that begets the security of R1.6 million *visa vis* the prescribed requirement in terms of the 2015 floor plan facility.
26. The defendant submits that there is no link pleaded between the plaintiff and the Fire Wings facility at all. The defendant's submission is that the link was necessary for a logical and lucid flow of allegations in order for the applicant to transit from the security ceded by Automaniac to Fire Wings. The defendant submits that this lack of coherence and flow, renders the pleading contradictory.
27. With regard to lack of the trigger event, the submission of the defendant is that although the applicant pleads that the October 2016 agreement replaced the February 2015 floor plan facility the basis for entitlement of the R1.6 million security does not flow from the prescribed terms and conditions contained in annexure POC5.
28. With regard to the disconnect between the terms and conditions and the particulars of claim, the submission of the defendant is that the plaintiff does

not have a cause of action to the return of the alleged sum claimed because although it has been inexplicably pleaded that the terms reference the retention of an investment, no such provision is actually contained in annexure POC5.

29. In consideration of the issues raised, and the contentions advanced by the plaintiff and the defendant respectively, the Court should not take over technical approach and refuse an amendment in circumstances where to refuse an amendment will cause intolerable injustice to the party seeking an amendment. In *Trans Drakensburg Bank Ltd vs Combined Engineering (Pty) Ltd* the Court recognised the right of the party to change or add to his or her case in a pleading but emphasised that he or she must explain the reason and show *prima facie* that he or she has something deserving of consideration, a triable issue, otherwise he or she cannot be allowed to harass his or her opponent by an amendment which has no foundation.
30. I have considered the plaintiff's particulars of claim, the amended pages, and the proposed amendment, and applied the legal principles that underpin amendments. Even on a generous reading of the proposed amendment, I had difficulty in following what the cause of action is and its formulation. The proposed amendment is confusing, it is difficult to understand the cause of action, and the proposed amendment is not drafted in a lucid, coherent and logical manner nor does it properly identifies the cause of action triable by Court.

31. I am of the view that if this amendment were to be allowed, it would prejudice the defendant and as such the defendant would not be able to plead thereto. I am satisfied that the two objections raised by the defendant to the proposed amendment should be sustained.
32. I agree with the defendant that the proposed amendment should not be allowed as allowing it will render the pleading excipiable.
33. As to costs, the party that seeks to amend seeks an indulgence. Ordinarily such party shall bear the costs. In this case, an objection has been raised to the proposed amendment. I have found the objection to be a valid objection. The Plaintiff was accordingly required in terms of Rule 28(4) to approach Court for leave to amend. The defendant was not unreasonable in opposing the proposed amendment, and it has been substantially successful in doing so. I find no reason why costs should not follow the result.
34. Accordingly, I make the following order:
- 34.1 The application for an amendment is dismissed with costs.


MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Local Division

Date of delivery: 21 May 2021

Appearances:

On behalf of the Plaintiff: Adv W Pye

Instructed by: Farah & Parker Attorneys

On behalf of the Defendant: Adv N Alli

Instructed by: Jay Mothibi Inc