REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2012/47752

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

SIGNATURE 1/01/2021 DATE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	Applicant/Plaintiff
And	
24 WENTWORTH VILLAGE (PTY) LTD	First Respondent/Defendant
P PROJECTS AND DEVELOPMENTS CC	Second Respondent/Defendant
PALM COURT MALL (PTY) LTD	Third Respondent/ Defendant
MPISI TRADING 150 (PTY) LTD	Fourth Respondent/Defendant
PARKES, GUY NEIL	Fifth Respondent/Defendant

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 4 January 2021

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is an application for leave to amend in terms of Rule 28(4) and consequent upon the respondents objecting to the applicant's Notice of Intention to Amend in terms of Rule 28(1) dated 15 November 2019 ('*Rule 28(1) Notice*').

[2] The Rule 28(1) Notice and the respondents' objection thereto concerns foreclosure proceedings instituted by the applicant against the first to fifth respondents on 14 December 2012. The respondents object to the proposed amendment on the basis that it would render the applicant's Particulars of Claim excipiable.

The litigation history

[3] The respondents delivered their Notice of Intention to Defend on 25 January 2013. The respondents have, to date hereof, failed to deliver a Plea.

[4] The applicant's erstwhile attorneys withdrew as attorneys of record on 2 March 2015.

[5] The applicant's current attorneys of record, being Jason Michael Smith Incorporated Attorneys ('*JMS*'), were appointed on 29 May 2018. Thereafter, the applicant served a Notice of Intention to Amend on 5 June 2019 and its amended pages on 25 June 2019. The respondents did not object to such amendment but

delivered a Notice to Remove Cause of Complaint in terms of Rule 23(1) on 17 September 2019 ('*Rule 23(1) Notice*').

[6] JMS addressed and delivered a letter to the respondents' attorneys on 30 September 2019 in terms of which it was proposed that the applicant would deliver a fresh Notice of Intention to Amend aimed at dealing with various causes of complaint raised in the Rule 23(1) Notice. The respondents' attorneys rejected the applicant's proposal.

[7] The applicant did not persist with the June 2019 amendment but filed another amendment on 19 November 2019.

[8] On 11 December 2019, the respondents delivered their Objection.

The amendment in summary

[9] The claim is based on a home loan facility granted by the applicant to the first respondent, with the second to fifth respondents being liable for the debts of the first respondent *qua* sureties and co-principal debtors. In particular:

9.1. The claim is based on three advances under the first respondent's home loan facility, namely for the following sums and made on the following dates:

9.1.1. May 2001, in the sum of R780 000;

9.1.2. April 2003, in the sum of R1 420 000; and

9.1.3. January 2006, in the sum of R280 000.

9.2. Each of the first two advances is secured by a continuing covering mortgage bond over an immovable property described as Erf 5355 Bryanston Extension 83 Township, which is owned by the first respondent.

[10] Paragraph 38 of the particulars of claim in its unamended form reads:

> 'The current monthly instalments are R62 735.28.'

[11] The plaintiff seeks in its second notice (the first having been abandoned) to amend paragraph 38 to read:

> 'The current monthly instalments are R65 546.77, which have been adjusted from time to time due to fluctuations in the outstanding balance, so that the full outstanding amount, with interest, is repaid within the agreed term, and which is in accordance with page 2 of the Disclosure Annexure to the Third Home Loan Agreement.'

[12] The respondents accept that the second Rule 28(1) Notice deals effectively with the causes of complaint raised in their Rule 23(1) Notice. The respondents only persist with one such complaint namely that the monthly instalments payable under the home loan agreement are improperly or inadequately pleaded in paragraph 11 of the Rule 28(1) Notice, as quoted in para [11] hereof. The grounds of objection are more fully considered from paragraph [21] of this judgment.

The applicable legal principles

[13] The primary object of allowing an amendment is '*...to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done...*' [1]

[14] The general principles in applications for amendment include[2] that the Court has a discretion whether to grant or refuse an amendment; an amendment cannot be

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[1] D E Van Loggerenberg & E Bertelsmann *Erasmus: Superior Court Practice* RS11, 2019, D1-331 and the authorities referred to in footnote 20 therein.

granted for the mere asking - some explanation must be offered therefor; the applicant must show that *prima facie* the amendment '*...has something deserving of consideration, a triable issue...*'; the modern tendency lies in favour of the granting of an amendment if such amendment '*...facilitates the proper ventilation of the dispute between the parties...*'; the party seeking the amendment must not be *mala fide*; the granting of the amendment must not '*...cause an injustice to the other side which cannot be compensated by costs...*'; the amendment should not be refused simply to punish the applicant for neglect; a mere loss of time is no reason, in itself, to refuse the application; if the amendment is not sought timeously, some reason must be given for the delay.

[15] The issue proposed to be introduced by the amendment must be a triable issue. A triable issue is one which, if it can be proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant, or which, as a matter of probability, will be proved by the evidence so foreshadowed.[3] In other words, an application for leave to amend is not designed to resolve a triable issue; it need only traverse a viable or relevant and triable issue.

[16] Where it is claimed that allowing an amendment would render a pleading excipiable, the Court must have due regard to the principles applicable to exceptions in terms of Rule 23.

[17] An exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action: it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing. Put differently, an exception that a pleading is vague and embarrassing strikes at the formulation of the

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[2] See *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 77F–I, cited with approval in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261C.

[3] *Erasmus* RS5, 2017, D1-338A and the authorities referred to in footnotes 77 and 78 therein.

cause of action and not its legal validity.[4] An exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced[5] if the offending allegations are not expunged.

[18] The approach in deciding exceptions based on vagueness and embarrassment, and arising out of a lack of particularity, can be summed up as follows:[6] In each case the court is obliged to consider whether the pleading does lack particularity to an extent amounting to vagueness (either meaningless or capable of more than one meaning); if there is vagueness in this sense, the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of; in each case an *ad hoc* ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects; the ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced; the onus is on the excipient to show vagueness amounting to embarrassment and embarrassment amounting to prejudice; the excipient must make out his case for embarrassment by reference to the pleadings alone.

Discussion

[19] It has become commonplace in foreclosure proceedings to plead the current monthly instalments payable under the relevant loan agreement. Indeed, the practice of pleading the current monthly instalments is recognised in the Practice Manual of

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[4] Id. at RS11, 2019, D1-298-299 and the authorities referred to in footnotes 46 and 48 therein.

[5] *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630.

[6] *Erasmus* (note 1 above) RS 11, 2019 at D1-299 to 300 and the authorities cited in footnotes 57 to 65 therein.

this Court.[7] It is not insignificant that no more than what the current monthly instalment is, needs to be pleaded.

[20] It is not disputed that the monthly instalments fluctuate depending on the outstanding balance on the home loan account at any given time. Indeed, this is expressly provided for in the Third Home Loan Agreement which, in relevant part, provides as follows:

> 'We may amend this monthly instalment from time to time due to fluctuations in the interest rate and/or in the outstanding balance, so that the full outstanding amount with interest is repaid within the agreed term. If we do so, we will advise you.'

[21] The Objection in summary raises the following:

21.1. The applicant has failed to plead '*...when and over what period the instalments increased...*'

21.2. The applicant has failed to plead how the amount of the current instalment is '*...actually arrived at.*'

21.3. The applicant has failed to plead when the agreed term of the home loan begins and ends.

21.4. The instalment amount, as pleaded, differs from the amounts debited to the home loan account.

21.5. The applicant has included untaxed legal fees in the amount outstanding.

21.6. The applicant has not pleaded that it notified the first respondent of an increase in the monthly instalments in terms of the Disclosure Annexure to the Third Home Loan Agreement.

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[7] Chapter 10.17.

[22] The respondents resort to extrinsic evidence to attempt to make out a case for prejudice. By way of example, the respondents seek to make out a case for embarrassment - and hence prejudice - by referring to myriad letters between the parties spanning more than a year as well as the respondents' Rule 35 (12) and (14) Notices and the applicant's response thereto. This is impermissible if the basis of the objection is, in effect, that the proposed amendment is excipiable on the grounds of it being vague and embarrassing, which is the case here. An excipient (the respondents *qua* objectors) must make out the case for vagueness and embarrassment by reference to the pleadings alone. There is no reason why an objector to a proposed amendment on the basis that the proposed amendment is vague and embarrassing should be allowed to traverse extraneous matter when an excipient raising the same grounds of exception is not permitted to do so.

[23] The respondents' opposition to this application for leave to amend appears to be premised upon a mistaken apprehension of the legal principles applicable to foreclosure proceedings: the respondents contend that the prejudice associated with the proposed amendment is that they cannot determine '*...the balance of equity between the parties, particularly with regard to Uniform Rule 46A...*' and inasmuch as the property in question is the fifth respondent's primary residence. Rule 46A is not applicable in the circumstances of this case. In *Investec Bank Limited v Fraser NO.*,[8] this Court pertinently and explicitly held that Rule 46A does not apply in cases where a juristic person or a trust is the judgment debtor, and irrespective of whether a director/shareholder/trustee resides in the immovable property in question.

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[8] 2020 JDR 1031 (GJ).

[24] In any event, a determination of whether there is equity in the immovable property in question is only relevant to the setting of a reserve price is. In *Absa Bank Ltd v Mokebe And Related Cases*,[9] a Full Bench held that:

> 'We cannot stress enough that this matter [the issue of a reserve price] concerns and applies only to those properties which are primary homes of debtors who are individual consumers and natural persons'

[25] The respondents' answering affidavit contains further misconceptions. By way of example, the respondents contend that they cannot determine how the arrears are made up, which is important because payment thereof will enable the first respondent to reinstate the home loan agreement. They also contend that the first respondent has a turnover lower than the threshold provided for in the National Credit Act 34 of 2005 ('*NCA*').[10] This they do in an attempt to bring this case - and the right of reinstatement in terms of section 129(3) - in line with the NCA. On any construction, the first respondent has no right to reinstate the home loan agreement by paying the arrears or otherwise, and inasmuch as in terms of section 4(1)(a)(i) of the NCA, the NCA does not apply to a juristic person who has an asset value or annual turnover over the amount determined in terms of section 7(1) thereof, i.e. R1 million. The first respondent patently has an asset value over R1 million inasmuch as it owns the immovable property in question. Also, in terms of section 4(1)(b) of the NCA, the NCA does not apply to a large agreement (defined in section 9(4)(a) to mean a mortgage agreement) in terms of which the consumer is a juristic person. Finally on this point: in terms of section 4(2)(c) of the NCA, the NCA applies to credit guarantees (the second to fourth respondents' deeds of suretyship) only to

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[9] 2018 (6) SA 492 (GJ) at para 59.

[10] In terms of section 7(1) of the NCA, as read with the relevant Regulations, the threshold amount for juristic persons is an asset value / annual turnover of R1 million or more.

the extent that it applies to the credit agreement in relation to which the credit guarantees are granted.

[26] In the final analysis, despite a prolix answering affidavit and reliance on extrinsic evidence (and at the pleadings stage), I am unable to find that the respondents are prejudiced by the proposed amendment in that they have been told what the current monthly instalments are; and why they are as pleaded. If the respondents disagree with such instalments and why they are as pleaded, they can deal therewith in a plea and obtain further information and documentation in due course, notably through discovery and requests for further particularity for trial. The issue of the current monthly instalments can be ventilated in due course. There is no need for the applicant to plead the secondary facts in support of the primary facts. In this latter regard the applicant is required to do no more than to plead what the current monthly instalments are, which it has done.

[27] Mr Lavine, who represented the respondents, in his heads of argument elaborated upon a host of complaints not raised in the notice of objection. I do not deal with such complaints as they are not before me nor was the applicant called upon to meet those objections in this application.

[28] In my view, the fundamental difficulty with the respondent's argument is that it conflates the variation of the interest rate with the fluctuations in the outstanding balance, the latter fluctuates and occurs so that the full outstanding amount, with interest, is repaid within the agreed term. The objection only deals with the instalment and not the interest rate.

[29] The other objections constitute potential defences and can and should be pleaded but are not grounds of exception nor are they grounds of opposition to an amendment within the grounds adumbrated in paragraph 21 of this judgment. The

applicant has included untaxed legal fees in the amount outstanding and that the applicant has not pleaded that it notified the first respondent of an increase in the monthly instalments in terms of the Disclosure Annexure to the Third Home Loan Agreement. These are defences, which should and can be pleaded out.

[30] The respondents have all the information available to them to calculate what, in their view, the amount is, which is owing to the applicant, if any. The opposition to the amendment, in the face of all this evidence available to them, is unreasonable which finding will be reflected in the costs order. I will not grant a punitive costs order against the respondents although the agreements permit of this, as, although unreasonable, I do not find the opposition to be *mala fide*.

Conclusion

[31] The applicant pleaded a full and comprehensive cause of action in what is a straight-forward foreclosure matter.

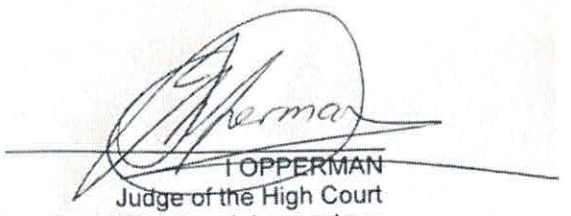
[32] This Court has the greatest latitude in granting amendments and having regard to all before me, I exercise my discretion in favour of the granting of the amendment.

Order

[33] I accordingly make the following orders:

1. The proposed amendment as set out in the applicant's notice of intention to amend dated 15 November 2019 is granted.
2. The respondents are to pay the costs of the application for leave to amend based on the applicants' notice of intention to amendment dated

15 November 2019, jointly and severally, the one paying the other to be absolved.



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicant: Adv M De Oliviera
Instructed by: Jason Michael Smith Inc Attorneys
Counsel for the respondents: Adv K Lavine
Instructed by: Andrew Garrat Inc
Date of hearing: 30 November 2020
Date of Judgment: 4 January 2021