IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

26 APRIL 2022
Date

Acting Judge K. Meyer

CASE NUMBER: 13733/2017

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA (SOC) LIMITED Plaintiff

and

TSWELOKGOTSO TRADING ENTERPRISE CC Defendant

JUDGMENT

K. MEYER AJ

[1] In this application the plaintiff, Airports Company South Africa (SOC) Limited, seeks leave to effect amendments to its particulars of claim filed in a trial action issued during April 2017 against the defendant, Tswelokgotso Trading Enterprise CC.

[2] The plaintiff's cause of action is the defendant's alleged failure to pay its monthly rental obligations in terms of a lease agreement entered into between the parties in respect of certain premises for the conducting of a business.

[3] In its particulars of claim the plaintiff has claimed payment of R5 820 280,00, interest and costs against the defendant as a result of the defendant's failure to comply with its rental obligations and it sets out certain pertinent terms of the lease agreement entered into between the parties. It attached a copy of the lease agreement to the particulars of claim.

[4] The plaintiff avers its own proper performance of its obligations arising from the terms of the lease agreement, the defendant's breach by non-payment, its demand made to the defendant for payment and its consequent cancellation of the agreement.

[5] The defendant pleaded to the particulars of claim and instituted a counterclaim on 5 June 2017. Thereafter the plaintiff pleaded to the defendant's counterclaim during or about November 2020. On 23 April 2020 the plaintiff

served a notice of intention to amend its particulars of claim in terms of rule 28, whereupon the defendant filed its objection thereto on 21 May 2020.

[6] On 23 December 2020 the plaintiff launched its application for leave to amend the particulars of claim in terms of rule 28(4). In terms of the amendment, the description of the parties in paragraphs 1 and 2 thereof was retained and the balance of the particulars of claim, i.e. paragraphs 3 to 6 thereof including the prayers, were substituted with the proposed new paragraphs. The proposed amended particulars of claim are more detailed and comprehensive than the existing particulars of claim, and may be described as having features that promote the proper ventilation of the issues between the parties. The plaintiff's cause of action remains unaltered, that is, the defendant's alleged failure to pay its monthly rental obligations in terms of the lease agreement between the parties.

[7] The proposed amendment contains additional allegations relating to matters such as the court's jurisdiction, dispute resolution, legal costs on the scale as between attorney and client, the mora interest rate, the cancellation date of the agreement and the defendant's alleged undertaking during September

2014 to make payment of its outstanding debt. These are matters which are not the subject of the defendant's objections.

[8] The defendant's objection to the plaintiff's proposed amendment is that, firstly, the plaintiff relies on 'new allegations and new amounts' (the quantum claimed) therein, secondly, that the allegations and amended amounts sought to be introduced by the amendment have prescribed in terms of the Prescription Act 1969, thirdly, the requisite breach notices were not attached to the particulars of claim, and lastly that the correctness of the amended quantum of the plaintiff's claim cannot be ascertained.

[9] The plaintiff contends that none of the grounds proffered by the defendant in the notice of objection justify refusal of the proposed amendment. Further, the plaintiff contends in particular that the notice of objection fails to meet the requirements of rule 28(2) of the Uniform Rules of Court in that the allegations objected to are neither identified nor has the exact reason why they should not be allowed being set out in the notice. Similarly, the plaintiff submits, the lack of exactitude and the alleged objectionable impact of the proposed amendments

relating to the alleged prescription of the new allegations, render these objections unjustifiable.

[10] The initial amount of rental claimed by the plaintiff in its particulars of claim was the sum of R5 820 280,00, which was predicated upon certain clauses in the agreement. The quantum of the plaintiff's claim for rental is reduced in terms of the proposed amendments to the sum of R3 920 395,49. This amount is made up of the rental previously claimed, though reduced, and certain charges such as operating costs and disbursements made.

[11] The issue for determination is whether the proposed amendment introduces a new cause of action and, if so, the defendant contends that the amendment ought not to be allowed and the application accordingly dismissed. The ancillary charges such as the operating costs and disbursements, formed part of the defendant's monthly rental obligation, the fixed rental forming one component and the variable components forming the other part of the rental obligation. The agreement is clear as regards both components of the monthly rental obligation. The plaintiff correctly contended that its cause of action remains the same as that which was pleaded at the outset, namely payment of

the arrear rentals owed in terms of the lease agreement. The ancillary charges are exactly that – ancillary – to the rental. Rather than introducing a new cause of action, the effect of the proposed amendment will be an expansion of the base of the existing cause of action.

[12] The proposed amendment will enhance the proper ventilation of the disputes between the parties and allow the parties to identify the real issues for determination in the interests of justice in the trial action. The plaintiff has explained the necessity to amend the quantum of its claim thus: "*the amount claimed is amended because on a proper and diligent consideration of conciliation of the defendant's account the plaintiff discovered that the amount the defendant owes to it is less than that initially claimed in the particulars of claim*". This fact is relevant to the consideration of prejudice to either party. It is trite that an important consideration in applications for amendment of pleadings is the question whether allowing the amendment will cause the opposing party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement of the matter. In this matter the parties are not yet at trial and accordingly a postponement is not necessary. Moreover, prejudice to the defendant in the event that the amendment is allowed has neither been alleged

nor established. In fact, the quantum of the plaintiff's claim is considerably reduced by the proposed amendment.

[13] I turn now to the defendant's submissions regarding the relevance of the Prescription Act. Prescription begins to run as soon as a debt is due. As stated in *Erasmus v Grunnow*,[1] "*the legislature saw a debt as a unitary concept for the purpose of prescription. It is not divisible in a sense that prescription can run against part of a debt and not run against another part.*"

[14] Accordingly, it is clear that it is the debt that prescribes, and not only part of the debt. In this matter the amount introduced in the amendment is part and parcel of the debt. The defendant's debt arose when it failed to pay its rental monthly, as alleged in the particulars of claim, and an amendment of the quantum of the claim in respect of the same debt does not bring about a new debt. Moreover, submissions and arguments regarding prescription may be dealt with more appropriately at the trial.

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[1] 1978 (4) SA 23 (O).

[15] The defendant has further raised the objection that the proposed amendment makes the pleadings excipiable in the sense that certain default notices referred to therein are not attached to the particulars of claim. The said notices form part of the *facta probantia,* and not the *facta probanda* required to be set out in a pleading. Accordingly, these are matters for evidence and will similarly more appropriately be dealt with at the trial.

[16] The defendant has further submitted that the guidance provided by the court in the matter of *Imprefed P/L v National Transport Commission*[2] must be taken into account. In this matter it cannot be said that the original particulars of claim were "*positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some later stage – in this case at the last possible moment be relied upon*". The plaintiff has proffered an explanation as to how it came about that the need for an amendment was recognised and is now sought. On no construction of the facts set out in the papers herein can it be said that the plaintiff positively misled the defendant, nor did it wait to the "*last possible moment*" to change course. The plaintiff simply seeks to widen the basis of a now reduced quantum of its claim for

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[2] 1993 (3) SA 94 (A) at 107D.

monthly rental which the defendant allegedly failed to pay. Moreover, what is to be gained by the amendment is a clearer definition of the evidentiary basis for the plaintiff's claim and definition of the issues.

CONDONATION OF LATE UPLOADING OF DOCUMENTS

[17] The defendant in the hearing of this matter raised a technical issue relating to the fact that the plaintiff had failed to upload a complete copy of the agreement of lease to the particulars of claim referred to in the objection. The parties stood down for some time in order for the plaintiff's counsel and attorney to address the matter with the result that the plaintiff's attorney filed an affidavit confirming that this was an unintentional error. I am satisfied with the explanation proffered during the hearing and accordingly condone any non-compliance in this regard.

COSTS

[18] It was submitted on behalf of the defendant that the plaintiff ought to be liable for the costs of the amendment if granted, while the submission on behalf of the plaintiff was that the determining question is whether or not the defendant's

opposition was reasonable. If it was reasonable, then the plaintiff ought to carry the costs and if not, it should not. The objection of the defendant to the proposed amendment was, in my view, unreasonable in all the circumstances of this matter. However, the plaintiff's application was launched some seven months after the defendant's notice of objection to the proposed amendment. Moreover, the plaintiff required the condonation referred to. I do not believe, therefore, that it will be an appropriate costs award to mulct the defendant for all the costs of the application.

[19] Accordingly, it is ordered that:

1.1 The plaintiff is granted leave to amend its particulars of claim in terms of the notice to amend dated 23 April 2020; and

1.2 each party is to pay its own costs of this application.

K MEYER
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Electronically delivered: this judgment was prepared and ordered by the acting judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file of this matter on CaseLines. The date of the judgment is 26 April 2022.

Heard:	27 October 2021
Judgment:	26 April 2022
Counsel for Plaintiff:	K. Mnyandu
Instructed by:	Salijee Govender van der Merwe Inc.
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Instructed by:	Beder – Friedland Inc.