



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 52269/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

.....

DATE

SIGNATURE

In the matter between:

DATE: 28/3/2014

MEDIHELP MEDICAL SCHEME

Plaintiff

and

MINISTER OF FINANCE

Defendant

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] Plaintiff issued summons against the defendant during September 2012 for payment of an amount of R9 997. 75 , being what it referred to as deductions made by the latter from its monthly subscriptions payments of “94 affected civil servants listed in Annexure “MH3” in respect of past subscriptions paid”¹

Since service of summons on the defendant, the plea filed by the latter has been amended at least twice. Plaintiff objected to a third attempt that forms the subject matter of this judgment.

It is necessary to set out the chronological order of the notices exchanged between the parties because it will certainly have a bearing on the question of defendant's bona fides in seeking the latest amendment as well as costs.

[2] Plaintiff had excepted to defendant's plea as amended and the matter was on the verge of being set down for hearing when defendant, on the eve of filing heads of argument instead filed a notice to amend the plea in question. I will revert to this later in the judgment.

When the parties appeared before me, there were two applications, (a) the exception and (b) leave to amend the plea. I enquired from Mr Jacobs who appeared on behalf of the plaintiff whether plaintiff persists with the

¹ Paragraph 9 of plaintiff's particulars of claim

exception in view of the application for amendment. Having perused the record, I was of the view that the previous amendments as well as the leave being sought for yet another were brought about by a concession of the merits of the notices to remove the causes of complaint. The answer to my question was an emphatic yes, the exception must be argued first.

Mr Jacobs referred me to page 251 of the record². In paragraph 3. 1 thereof, Mr. **Stephen Kete Ralekwa** stated that *"I do not understand nor accept that the applicant has conceded any grounds for the exception"*.

[3] This assertion by deponent on behalf of the defendant is in my view opportunistic because on the same breath, and when convenient to do so, the following allegations are also made:

" 5.2 I point out that the Applicant inadvertently based its initial plea on an incorrect statute and the Rules of Medihelp which were no longer in force. This became apparent when further consultations were held with the personnel in treasury responsible for the administration of the agreement.

5.3 The proposed amendment raises points of law of sufficient Importance to a claim of a substantial amount. The previous rules of the Respondent's Medical Scheme offered different bases of

² Replying affidavit

termination of membership and it was also per the instructions given to the legal representatives that there was a process undertaken by the parties in administering the agreement"

The reason why I say the assertions by Mr. Ralekwa are opportunistic is because Plaintiff has contended in the various notices directed at defendant to remove cause of complaint that the agreement between government and the affected employees was subject to current law. Defendant was challenged on the lawfulness of its defences on the basis of the Medical Scheme Act, as amended, a fact defendant only acknowledged in the replying affidavit.

[4] Although there is no concession that the exception did have some merit, at least in as far as the law is concerned, by its own admission, defendant's plea was based on earlier versions of the Medical Scheme Act and Regulations.

[5] I agree with Mr. Semanya who appeared for the defendant that the correct approach is to look at the proposed amendment, and if it is good, to grant the application to amend. I may also add that if I dismiss the application, the correct order will be to afford the defendant an opportunity to amend its plea.

[6] One of the factors to be taken into account when considering an application for amendment is whether the proposed amendments will render the plea excipiable. It stands to reason that I should not consider the grounds of exception levelled at the plea that is sought to be amended because doing so would be an academic exercise.

Questions of excipiability are relevant though , but only with regard to the proposed amendment . If the same issues arise, then they are worthy of consideration to determine whether the proposed plea will be excipiable. In the matter of Du **Plessis and another v De Klerk and others**³ Van Dijkhorst J set out the position as follows:

“An amendment which would render a pleading excipiable should not be allowed. Whether a pleading would or would not become excipiable is a matter of law which should be decided by the Court hearing the application for amendment. It would be incorrect, in my view, to hold that it is arguable that the amendment would not render the pleading excipiable, allow it, and send the parties away to prepare for another battle on exception on the same point”.

³ **1995 (2) SA 40** (T), 43I-44A.

**THE PARTICULARS OF CLAIM AND THE PLEA DATED 03 DECEMBER 2012 ,AS
AMENDED**

[7] I deem it necessary to reproduce the relevant portions simply because one of the objections to the proposed amendment is that it seeks a withdrawal of an admission in the earlier plea.

[8] The relevant and material portion of the particulars of claim are:

" 1. The plaintiff is Medihelp Medical Scheme, a medical scheme registered in terms of the Medical Schemes Act 131 of 1998 with head office at 84 Steve Biko Street, Arcadia, Pretoria.

2.....

3. At all times material hereo and in terms of a collective agreemet reached by the Chamber of Public Service Bargaining Council at Central Level on 04 November 1993 the South African Government as employer on one side and number of em[loyee orgnisations representing civil servants affected on the other, agreed on medical assistance at retirement or terminationmof service of civil servants ("the agreement"). A copy of the Agreement is attached hereto marked "MH1".

4. The Agreement was subject to applicable legislation and cnfirmed by a resolution of the Public Service Co-ordinating Bargaining Council during 1999.

5. In 2005 the defendant, represented by National Treasury, informed the affected civil servants (and their surviving spouses) of their rights to medical assistance at retirement or termination of service in terms of the Agreement and in particular:

5.1 informed the affected civil servants (and their surviving spouses) of their right to join any medical scheme as a member;

5.2 confirmed that the State assumed responsibility for payment of subscriptions of membership of affected civil servants (and their surviving spouses) to a medical scheme.

A copy of the general notice ("the General Notice") is attached hereto as "MH2"

6. In terms of the Agreement and the General Notice the affected civil servants whose names are listed in column 3 of annexure "MH3" attached hereto, informed the defendant and the plaintiff of their choices to become and remain members of the plaintiff. The Medihelp membership number of each affected civil servant appears in column 2 of annexure "MH3".

7. At all material times hereto the plaintiff was, as a registered medical scheme, obliged to accept the affected civil servants (and their surviving spouses) as members with full benefits in terms of the plaintiff's rules until termination of their membership according to the plaintiff's rules.

8. At all material times hereto the defendant paid to the plaintiff the membership contributions of the affected civil servants whose names are listed in column 3 of annexure "MH3".

9. The defendant, despite the granting by the plaintiff of membership to the affected civil servants (and their surviving spouses) and in breach of its obligations in terms of the Agreement and General Notice, deducted from monthly subscription payments the total sum of R9 997 256.75 being the subscriptions of the 94 affected civil servants listed in Annexure "MH3" opposite the name of an affected civil servant.

10. In the circumstances the defendant is indebted to the plaintiff in the sum of R9 997 256.75 and interest on that sum at 15.5% per annum from the date of service of summons to date of payment".

[9] Defendant's plea as amended⁴ reads as follows:

1. **AD PARAGRAPH 1 TO 8**

1.1 The Defendant admits that the Plaintiff is a registered medical scheme in terms of the Medical Schemes Act, 131 of 1998.

1.2 The Defendant has no knowledge of the head office of Plaintiff and cannot admit same.

1.3 The remainder of the allegations in these paragraphs are admitted.

2. **AD PARAGRAPH 9**

⁴ by notice dated 18 February 2013. Plaintiff indicated by letter dated 05 March 2013 that it had no objection to the proposed amendment. The amendment, which effectively replaced paragraph 2.8 in its entirety was apparently effected on 11 March 2013.

2.1. The defendant admits that it deducted the amount of R 9 997 256. 75 being subscription of the 94 civil servants listed in Annexure "MH3" of the Plaintiff's Particulars of Claim.

2.2. The Defendant pleads further that in terms of the agreement Annexure "MH 1" to the Plaintiff's Particulars of Claim, the benefits of the civil servants listed in "MH 3" to the Plaintiff's Particulars of Claim were to comply with the terms of the Staff Code Chapter DXI/III of 1/12/1993 annexed hereto marked "DEF 1".

2.3. The material terms of "DEF 1" are:

2.3.1. To establish a basis according to which medical assistance can be rendered to officers or employees who retire;

2.3.2. The persons who qualify were employees who retire as a result of the attainment of the normal retirement or pensionable age as prescribed by statute; ill-health which is not ascribed to their own doing; employees who are 60 years or older – whose services are terminated by the employer as a result of abolition of their posts or re-organisation, or to promote efficiency, or to economise; who, at own request, retire with the approval of the employer (but not as a result of misconduct or incapacity) or as a result to early retirement; or who according to a decision by the employer and the heads of department who retire, or their surviving spouses.

2.3.3. The benefits are also subject to the Rules of the Plaintiff applicable to each particular member at the time of the member's retirement.

2.3.4. At all material times hereto, the Rules of the Plaintiff's medical scheme, and annexed hereto as "DEF 2" which provide:

"Rule 14 " General Rules for Termination"

"14(1) No member for whom membership of MEDIHELP is a condition of service in terms of an agreement between MEDIHELP and an employee may, while he remains in service resign without the consent of his employee or be deprived of his membership without prior notification to his employer.

14(2) Subject to the provisions of rule 14(1), membership of MEDIHELP shall terminate -

14(2)(a) at death;

14(2)(b) ...

14(2)(c) ...

14(2)(d) when a pensioner – or widow member or a person who in terms of rule 6 enjoys continued membership resides outside the borders of the Republic for a period of longer than six months, excluding such member who settled in the Republic of Namibia before 21 March 1990: Provided that the MEDIHELP, in its discretion, may approve of such member retaining his membership if he , prior to or within six months advises MEDIHELP in writing of the visit abroad and the purpose thereof and MEDIHELP satisfied that he does not intend staying abroad for an indefinite period.

14(2)(e) ...

14(2)(f) When a member no longer qualifies for the membership in terms of the Rules:"

2.4. The defendant pleads further that it is the responsibility of Plaintiff as a registered medical aid scheme, to ensure that its database is updated and

correctly reflects the status of its members and also advise the Defendant with names of individuals whose membership has terminated.

2.5. Notwithstanding the aforesaid, Plaintiff failed, alternatively neglected to ensure that its database is up to date and remain so, correctly reflecting inter alia, deceased members, members living abroad for more than 6 months, student dependants and remarried widows.

2.6. The members listed in Annexure "MH 3" to the Plaintiff's Particulars of Claim were out of the country for more than 6 months, alternatively deceased and their membership was accordingly terminated.

2.7. The Defendant continued to pay contributions to the Plaintiff in respect of the members listed in "MH 3" after the termination of membership.

2.8. The contributions of the members were paid to the plaintiff in terms of a process of more than twenty years duration, practiced by both parties that the Plaintiff would submit a monthly spreadsheet indicating that the amount payable for that month, and the Defendant would deduct from the total mount, any amounts Defendants had already paid to the Plaintiff in respect of members whose membership had terminated.

2.9. Save for the foregoing, the Defendant denies the remainder of the allegations in this paragraph.

3. **AD PARAGRAPH 10**

3.1 The allegations made in this paragraph are denied.

[10] Plaintiff had earlier on (before the March 2013 amendment) and on 28 January 2013, given defendant Notice in terms of Rules 30(2)(b), 30A and

23(1) that it intended to take exception that the latter's plea dated 3 December 2012 was vague and embarrassing and that it *"does not comply with the provisions of Uniform Rule of Court 18(4) and 18(6) and thus constitutes an irregular step in terms of Rule 18(12)"*.

Defendant served a notice of amendment on 21 February 2013 in terms of which it intended to delete and replace paragraph 2.8 of its plea. Plaintiff wrote a letter to defendant and indicated that it would not object to the proposed amendment.

[11] On 27 March 2013, Plaintiff issued a Notice in terms of Rules 23(1) and (2) in terms of which it indicated its intention to take exception to defendant's plea dated 03 December 2012 as amended on 11 March 2013 on the basis that it is vague and embarrassing alternatively , that it lacks averments which are necessary to sustain a defence.

[12] It is not necessary, for reasons stated above to go into the grounds for the exception because of the approach I have adopted, i.e to look at the amendment, and if it good in law, to grant the application or to refuse if it is not. Issues of excipiability will only arise with regard to the proposed amendment.

[13] Defendant filed yet another notice of intention to amend its plea on 15 April 2013. Plaintiff objected to the proposed second amendment by notice dated 29 April 2013 on the basis that it does not remedy the fatal defects rendering the Defendant's Plea excipiable on the grounds set out in the Plaintiff's Notice of Exception dated 27 March 2013.

[14] It is necessary to reproduce the grounds of objection because they appear to confirm defendant's assertion in the replying affidavit in support for application for leave to amend that *"Applicant inadvertently based its initial plea on an incorrect statute and the Rules of Medihelp which were no longer in force. This became apparent when further consultations were held with the personnel in treasury responsible for the administration of the agreement"*.

[15] In paragraphs 1.1 and 1.2 of the notice of objection, plaintiff stated the following:

"1.1 the proposed amendment intends to introduce obligations imposed by law on the Plaintiff to terminate the membership of the persons listed in Annexure "MH3" to the Plaintiff's particulars of claim on unlawful grounds in terms of the Medical Schemes Act of 1998; and

1.2 the obligations alleged by the Defendant in his Plea and incorporated in his proposed amendment contain obligations that if

performed would constitute a contravention of the Medical Schemes Act of 1998"

[16] On 16 May 2013, the State Attorney addressed a letter to Plaintiff's attorneys and advised them , amongst other things that his "*client will not proceed with the intended amendment please be advised that you may set the exception down for hearing*".

[17] Plaintiff duly filed a Notice of exception to the defendant's plea with the amendments of 11 March 2013 on 18 June 2013 on the basis that it *lacks averments which are necessary to sustain a defence alternatively, that it is vague and embarrassing*".

[18] I am certain that by now plaintiff was confident that the exception will finally be heard and that there was no longer going to be another attempt to amend. Plaintiff complied with the Practice Directives by preparing heads of argument and filed its practice note on 01 July 2013.

[19] The comedy of errors was not over yet. Defendant, instead of filing its practice note, filed a third notice of amendment on 16 July 2013.

Plaintiff filed an objection on 30 July 2013. The application to amend was duly filed on 26 August 2013.

THE PROPOSED AMENDMENT

[20] The proposed amendment reads as follows:

"KINDLY TAKE NOTICE THAT the defendant hereby gives notice of it's intention to amend its plea as follows: -

" A. By deleting the plea dated 03 December 2012 in its entirety and substituting therefore the following: (my emphasis)

"SPECIAL PLEA

The defendant raises the following Special Plea to plaintiff's claim: -

1. *The Plaintiff relies on the provisions of a collective agreement reached by the Chamber of Public Service Bargaining Counsel at Central Level on 04 November 2003, the South African government as employer on the one hand and a number of employee organizations representing civil servants on the other agreed on medical assistance at retirement or termination of service of civil servants ("the agreement"). A copy of the agreement is attached to the Plaintiff's particulars of claim and is marked "MH1".*

2. *The Plaintiff also relies on the general notice, annexed to the Plaintiff's particulars of claim and marked annexure "MH2" wherein the National Treasury informed the affected civil servants of their rights to medical assistance at retirement or termination of service in terms of that agreement and in particular informed the affected civil servants of their right to join any medical scheme as a member and*

confirmed that the State assumed responsibility for payment of subscriptions of membership of the affected civil servants to a medical scheme.

3. The plaintiff is not a party to the agreement annexure “**MH1**” in the circumstances, there being no privity of contract between the Plaintiff and the Defendant, the Plaintiff has no locus standi to assert any rights or obligations which attach to an agreement to which it is not a party.

WHEREFORE Defendants prays that the Plaintiff's claim be dismissed with costs.

Should the defendant's special plea not be upheld, then in that event, the Defendant pleads to the Plaintiff's particulars of claim as follows

The defendant pleads as follows to the Plaintiff's Particulars of Claim:

4. AD PARAGRAPH 1 TO 8

4.1 The allegations made in these paragraphs are admitted.

4.2 The Defendant pleads further that the medical benefits provided by the Plaintiff to the affected persons were, inter alia, subject to the Rules of Medihelp which inter alia provide as follows:

“ Death of the Member

11.5 The membership of a deceased member shall terminate on the day following the date of death.

“Failure to pay amounts due to Medihelp

11.6 *If a member fails to pay subscription and/or any other amount due to Medihelp on the date on which it became due, Medihelp shall notify such member and participating employer thereof and inform the member and/or participating employer if not settled on the date indicated in the letter, benefits shall be suspended in respect of claims which arose during the period of default and that membership may be terminated if the arrears subscription and/or amount due is not remitted within thirty (30) days from the date of suspension: provided that the Principal Officer may, in his exclusive discretion, determine the period that the period in which the arrears subscription and/or other amount due may be remitted and interest may be charged at the prime rate of Medihelp's bankers.”*

5. *The Defendant pleads further that in terms of the aforesaid Rule of the Plaintiff, if a member fails to pay a subscription the following consequences or sequelae arise from such failure:*

5.1 *The Plaintiff must notify the member and the participating employer of such failure;*

5.2 *The Plaintiff must notify the member and the participating employer that if the subscription amounts are not settled on the date indicated in the letter, benefits **shall** be suspended; in respect of claims which arose during that period of such default;*

5.3 *The Plaintiff must notify the member and the participating employer that if the subscription amounts are not settled, that membership may be*

terminated if the arrear subscription and/or amount due is not remitted within thirty (30) days from the date of suspension; and

5.4 *With the proviso that the principal Officer has an exclusive discretion to determine the period in which arrear subscriptions and/or other amount due may be remitted and interest may be charged.*

5.5 *The subscriptions in respect of the 94 affected civil servants listed in annexure "MH3" have been unpaid for a period of more than thirty (30) days.*

5.6 *The benefits of the affected members were, in terms of the Plaintiff's Rules, suspended thirty (30) days from the date of failure to pay the subscription.*

5.7 *The membership of the affected persons would be terminated unless the arrear subscriptions are remitted within thirty (30) days from the date of suspension.*

5.8 *The arrear subscriptions of the affected member were not remitted within thirty (30) days of the suspension of their benefits.*

5.9 *The membership of the affected members was, in terms of the Rules of the Plaintiff, terminated.*

6. **AD PARAGRAPH 9**

6.1 The Defendant admits that he did not pay the subscriptions totaling the amount of R9 997 256. 75 being the subscriptions of the 94 affected civil servants listed in annexure "**MH3**".

6.2 Alternatively, since the membership of persons indicated in annexure "**MH3**" of the Plaintiff's particulars of claim no longer qualified for membership in terms of the Plaintiff's Rules, the Defendant paid the sum of R 9 997 256. 75 to the plaintiff in error.

6.3 The aforesaid sum of R 9 997 256. 75 was neither due nor owing to the defendant since the membership of those persons indicated in annexure "**MH3**" had terminated.

6.4 The Plaintiff was enriched unjustly by R 9 977 256. 75 at the expense of the Defendant.

6.5 Save as aforesaid, the remainder of the allegations made in this paragraph are denied.

7. AD PARAGRAPH 10

7.1 The allegations made in this paragraph are denied. "

OBJECTION TO THE PROPOSED AMENDMENT

[21] On 30 July 2013 plaintiff filed an objection to the proposed amendment. It reads as follows:

TAKE NOTICE that the plaintiff objects to the defendant's proposed amendment dated 15 July 2013 on the following grounds:

"1. PLAINTIFF'S FIRST OBJECTION: AD "SPECIAL PLEA":

1.1 In paragraphs 1 and 2 of his proposed special plea the defendant avers that the plaintiff relies on a collective agreement and the general notice attached to the plaintiff's particulars of claim as **Annexure "MH1" and "MH2"** respectively.

1.2 The Defendant admits in paragraph 1 of his plea the allegations contained in paragraphs 1 and 8 of the plaintiff's particulars of claim, which admission makes it common cause in these proceedings that " At all times material hereto the defendant paid to the plaintiff the membership contributions of the affected civil servants whose names are listed in column 3 of Annexure "MH3".

1.3 The defendant's plea and the proposed amended plea further admit payments, the amounts of which the defendant later deducted from other payments to the plaintiff.

1.4 The defendant's "SPECIAL PLEA" which he intended to introduce by way of this third proposed amendment would be excipiable on the grounds that the plea would be vague and embarrassing in that:

1.4.1 The "SPECIAL PLEAS" does not deal with and contain no reference to the factual averments in paragraph 9 and 10 of the plaintiff's particulars of claim which factual averments, if ignored in

the defendant's amendment, clearly shows standing in law for the relief sought by the plaintiff;

1.4.2 *The locus in iudicio of the plaintiff is apparent from the admission referred to in 1.2 above and the content of the plaintiff's particulars of claim read with the body of the defendant's proposed amended plea;*

and

1.4.3 *No basis is laid in the body of the defendant's proposed amended pleas for the defence purportedly raised by the "SPECIAL PLEA" and the "SPECIAL PLEA" contradicts the body of the defendant's proposed amended plea rendering it vague and embarrassing and, therefore, excipiable.*

1.5 *Under the circumstances the defendant's "SPECIAL PLEA" would, if allowed to be introduced by the proposed amendment render the pleas vague and embarrassing and, therefore, excipiable.*

2. PLAINTIFF'S SECOND OBJECTION TO THE PROPOSED AMENDMENT:

The Defendant's "SPECIAL PLEA" is declinatory in nature and should have been raised in initio litis and any defect that might have existed in the plaintiff's particulars of claim is regarded as condoned by the defendant and can only be effected after full explanation on oath of withdrawal of such condonation.

3. **PLAINTIFF'S THIRD OBJECTION TO THE PROPOSED AMENDMENT:**

3.1 In his initial plea and in his amended plea brought about by the first and second amendments, the defendant makes the following admissions:

"The Defendant admits that it deducted the amount of R 997 256. 75 being the subscriptions of 94 affected civil servants listed in Annexure "MH3" of the Plaintiff's Particulars of Claim."

3.2. This admission is made by the defendant in answer to an express allegation in paragraph 9 of the plaintiff's particulars of claim that the deductions were made in respect of past subscriptions paid by the defendant to the plaintiff.

3.3. The proposed amendment, therefore, provides for the withdrawal of an admission in that it introduces in paragraph 6.1 thereof a denial of the deduction previously admitted by the defendant.

3.4. The plaintiff, therefore, objects to the proposed third amendment on the ground that it contains the withdrawal of and admission without satisfactory explanation thereof.

4. **FOURTH GROUND OF OBJECTION TO THE PROPOSED AMENDMENT:**

4.1. In paragraph 4.2 of the defendant's proposed amended pleas he relies on the extract from the plaintiff's rules providing for failure by "a member" to pay "subscriptions and/or other amounts due to Medihelp".

4.2. *The obligation of "a member" to pay the subscriptions is repeated in paragraph 5 of the proposed amended pleas.*

4.3. *Reliance on the alleged obligation of "a member" to pay subscriptions, flies in the face of the admitted obligations, alleged in paragraph 5 and 8 of the plaintiff's particulars of claim to the effect that the obligation to pay the subscriptions was that of the defendant as functionary of the Sate and not that of "a member".*

4.4. *These contradicting allegations sought to be introduced by the proposed amendment renders the plea vague and embarrassing and, therefore, excipiable on that ground.*

5. FIFTH GROUND OF OBJECTION TO THE PROPOSED AMENDMENT:

5.1 *in paragraph 5.1 and 5.2 of the proposed third amendment the defendant attempts to introduce obligations of and concerning "a particular employer" into his plea.*

5.2 *The term "participating employer" is a term defined in the plaintiff's rules and quoted out of context in the defendant's plea. A true copy of the plaintiff's rules quoted from by the defendant is attached hereto for ease of reference as "MH4".*

5.3 *Rule 5 of the plaintiff's rules read with the Medical Schemes Act, 1998, the term "participating employer" to mean "an employer who*

has contracted with Medihelp for the purposes of admissions of its employees as members of Medihelp."

5.4 *The defendant does not allege any contractual relationship of any nature between the plaintiff and the defendant and the Supreme Court of Appeal has ruled that no such agreement existed since July 2005.*

5.5 *In the absence of an allegation that complies with the Rules of Court that a "contract" provided for in the plaintiff's rules had been concluded between the plaintiff and the defendant, none of the obligations alleged in paragraph 5 of the defendant's proposed amended plea exists in law.*

5.6 *In the premises the plaintiff objects to the proposed amendment on the ground that that, if effected, it would render the defendant's plea excipiable as vague and embarrassing, alternatively that the amendment would cause the amended pleas to fall foul of the provisions of Rule 22(2) in that it does not clearly and concisely state all the material facts upon which the defendant relies.*

6. THE SIXTH GROUND OF OBJECTION TO THE PROPOSED AMENDMENT

6.1 *In paragraph 6.2 to 6.5 of the defendant's proposed amended plea he alleges an unliquidated claim based on unjust enrichment without counterclaiming.*

6.2 *In law existence of enrichment is judged at the time of institution of action, or, as in this instance, at the time the amendment introducing the enrichment claim is effected.*

6.3 *The defendant's plea is, therefore, for an unliquidated amount based on unjust enrichment, which may only be claimed in reconvention.*

6.4 *In the premises the defendant's proposed amended pleas would not disclose a defence and would be bad in law and, therefore, excipiable on that basis.*

APPLICATION FOR LEAVE TO AMEND THE PLEA

[22] The application in terms of Rule 28(4) was filed on or about 27 August 2013.

[23] In its affidavit, defendant attacked the plaintiff's grounds of objection but did not, itself offer any tangible explanation as it is required to for the amendment at this stage save to make some conclusions of law without laying a proper factual basis. In paragraphs 19 of the affidavit the following allegations are made:

“ 19. *I submit that the proposed amendment is made bona fide and that the amendment does not cause any injustice or prejudice to the other side which*

cannot be compensated by costs or a postponement. I further submit that prima facie there is a triable issue deserving of consideration and the amendment is not mala fide."

[24] The explanation for introduction of the proposed plea only came out in the replying affidavit⁵. I will deal with it later.

Plaintiff in its answering affidavit repeated the grounds of objection. It also challenged the defendant that it had conceded the exception and that the amendment would be a withdrawal of earlier admissions in the plea sought to be amended.

[25] The explanation offered for the amendment is briefly that:

(a) The plaintiff's representatives only realized that there are points of law that should be raised as a defence after consultation with personnel responsible for administration of the agreement.

(b) The plea filed was founded on the law before its amendment as well as the prior Rules of Medihelp. Plaintiff conceded that this was an error because the Act and Rules have since been amended.

⁵ An application to condone late filing of the replying affidavit was also made. It was not opposed and was granted.

SUBMISSIONS

[26] In their heads of argument, counsel for the defendant describe the application for amendment as seeking to raise (a) a special plea contending that plaintiff does not have locus standi to enforce any rights or perform any obligations in terms of the agreement between the state and and public service employees because it was not party thereto , and (b) Plaintiff's remedy in the event of non payment of subscriptions is cancellation of membership. Plaintiff has no right to seek payment of contributions.

[27] In his oral submission, Mr. Semenya argued that the admissions made in the plea do not create a legal relationship between plaintiff and the defendant. The affected members would have a right to litigate against defendant if there is a breach of the agreement referred to in the particulars of claim. It is not clear, so the argument went, whether the plaintiff's right to litigate is derived from contract or delict. Allegations that the special plea is declinatory in nature have nothing to do with the locus standi of plaintiff.

[28] Mr Semenya argued further with regard to the plea-over that:

(a) Allegations that defendant withdrew its earlier admission payment of the amount in question. According to him, the allegations in the proposed amendment are still an admission that the money was not paid.

(b) The SCA did not resolve the issue of locus standi. An affected member was party to SCA proceedings with plaintiff.

(c) Reference to “participating member” in the proposed amendment is not an issue.

(d) Defendant does not have to allege any contractual relationship between the parties.

(e) The existence of a counterclaim is irrelevant.

(f) There is nothing in the proposed amendment that is likely to create an embarrassment or vagueness. The plea introduces two defences; namely, locus standi and that the payment was made in error because it was not due for one or other reason in terms of the Rules of the Medihelp Medical Scheme.

[29] Mr Jacobs also filed heads of argument on the proposed amendment.

In essence, the objection to the proposed amendment is premised on :

(a) the allegation that defendant cannot raise a special plea challenging plaintiff's locus standi when it has admitted certain averments in the particulars of claim such as the existence of the agreement between government and the affected employees and that the former has been making monthly contributions on behalf of

the latter. This, so the argument goes renders the special plea vague and embarrassing.

(b) The averment in the proposed amendment that defendant did not pay the contributions amounts to a withdrawal of an earlier admission that it deducted the amount in question.

(c) Reliance on obligations of plaintiff in terms of the Rules of the Medical Scheme renders the plea vague and embarrassing because defendant had admitted that the state had an obligation to pay subscriptions.

LEGAL PRINCIPLES ON AMENDMENTS OF PLEDINGS

[30] I am grateful to both counsel for their heads of argument. The cases referred to therein were of great assistance to the court. I may not be too pleased with the manner in which plaintiff prepared its initial plea and even more surprised why its legal team failed or took so long to realize what the real issues are or even perturbed by reliance on old versions of the Medical Schemes Act and Regulations.

[30.1] The point is, I cannot ignore the rights of a litigant to have his/its case properly ventilated and on the basis of correct facts and the law.

As Wessels J put it in the matter of **Whittaker v Roos and another; Morant v Roos and another** 1911 TPD 1092, 1102 :

"This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties.'

[30.2] It would also be an injustice to refuse an amendment where it is clear that there has been a mistake or neglect in the manner in which the plea sought to be amended was prepared. There must be justice between the parties.⁶

"These observations, in all four Provinces, make it clear, I consider, that the aim should be to do justice between the parties by deciding the real issues

⁶ Caney J, in **Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and another 1967 (3) SA 632** (D) 640H-641B

between them. The mistake or neglect of one of them in the process of placing the issues on record is not to stand in the way of this; his punishment is in his being mulcted in the wasted costs. The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs and, where appropriate, a postponement. It is only in this relation, it seems to me, that the applicant for the amendment is required to show it is bona fide and to explain any delay there may have been in making the application, for he must show that his opponent will not suffer prejudice in the sense I have indicated. He does not come as a suppliant, cap in hand, seeking mercy for his mistake or neglect. Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable ... or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching his opponent unawares ... or of obtaining a tactical advantage or of avoiding a special order as to costs.'

[31] Firstly, I do not believe that the proposed amendment is being made mala fide. It is clear from the history of the notices set out in this affidavit that defendant's case was not properly pleaded, hence an admission that the representatives only became aware that the law has changed at a later stage. I cannot see how this would prejudice the plaintiff. Defendant is

entitled to raise a new ground of defence that comes to its knowledge after filing of its plea.⁷

[32] I do not agree with plaintiff that the proposed amendment seeks to withdraw earlier admissions made in the plea filed. It is a fact that the agreement between Government and the affected employees exist in terms of which the latter is obliged to make contributions to medical schemes . Admitting this fact does not amount to admission of legal standing for third parties who are not party to the agreement to enforce any rights arising from the agreement.

[32.1] Equally, an assertion that payments were not made in the proposed amendment is not a withdrawal of an admission that deductions were made. If anything, the allegations in the particulars of claim in this regard were not elegantly put.

[32.2] The fact of the matter is that defendant paid the contributions and at some point paid less than what it had been paying. The issues arising from this are a matter of evidence.

⁷ Flemmer v Ainsworth 1910 TPD 81

[32.3] Consequently, I am not prepared to treat it as a withdrawal of an admission.

[33] On the question of locus standi, legal precedents are clear that this cannot be decided at exception stage. In any event, the allegation is that defendant has condoned it because of the admissions in the plea. I have already addressed this point. It is trite that lack of locus standi is a defence in law.

[34] in **Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (TkGD)** At 77F-I White J, examined old authorities that dealt with the principles of amendment of pleadings . The learned judge summarized them as follows:

1. *The Court has a discretion whether to grant or refuse an amendment.*
2. *An amendment cannot be granted for the mere asking; some explanation must be offered therefor.*
3. *The applicant must show that prima facie the amendment 'has something deserving of consideration, a triable issue'.*
4. *The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.*
5. *The party seeking the amendment must not be mala fide.*
6. *The amendment must not 'cause an injustice to the other side which cannot be compensated by costs'.*
7. *The amendment should not be refused simply to punish the applicant for neglect.*

8. *A mere loss of (the opportunity of gaining) time is no reason, in itself, for refusing the application.*
9. *If the amendment is not sought timeously, some reason must be given for the delay.*

VAGUE AND EMBARRASSING

[35] Rule 18(4) of the Uniform Rules of Court provides as follows: "*Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity⁸ to enable the opposite party to reply thereto.*"

[36] Ambiguity on its own is not sufficient. There must be evidence that the opposing party will be seriously prejudiced if the relevant portions in the declaration are allowed to stand. The vagueness must relate to the cause of action⁹

[37] In the Trope case¹⁰, Macreath J considered the meaning of "vague

⁸ *Trope and Others v South African Reserve Bank* (641/91) [1993] ZASCA 54; 1993 (3) SA 264 (AD); [1993] 2 All SA 278 (A) (31 March 1993)

⁹ *Carelsen v Fairbridge , Ardene & Lawton* 1918 TPD 306 at 309, approved in amongst other cases; *Liquidators Wapejo Shipping Co. Ltd v Lurie Bros* 1924 AD 69 at 74

¹⁰ at t 211

and embarrassing" in the context of exceptions and the nature of the enquiry that the court should undertake.

"No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.

The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law.

An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the Excipient is prejudiced (Quinlan v MacGregor [1960 \(4\) SA 383](#) (D) at 393E-H). As to whether there is prejudice, the ability of the Excipient to produce an exception-proof plea is not the only, nor indeed the most important, test - see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC [1991 \(2\) SA 297](#) (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.

Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing - see Parow Lands (Pty) Ltd v Schneider [1952 \(1\) SA 150](#) (SWA) at 152F-G and the authorities there cited.

It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading."

CONCLUSION

[38] I have already made a finding that the application to amend the plea was made in good faith . The intention, as it appears from the explanation, which plaintiff did not dispute, is to introduce defences that were not apparent to the defendant at the time the plea was prepared.

There is no apparent prejudice to the plaintiff. The pleadings have not closed.

[39] The defences raised will not render the plea excipiable . The plea of locus standi is a defence in law. The plaintiff may utilize the procedures of discovery and request for further particulars with regard to the defence that payment was made in error.

It is clear from the pleadings that the relationship between government and the affected employees with regard to payment of medical contributions is governed by rules, and similarly, there are rules governing acceptance and termination of membership to medical schemes. How these rules apply to the facts of this case is a matter of evidence and does not have to be pleaded.

[40] Under the circumstances, the application to amend the plea should succeed.

COSTS

[41] It is trite that a party who seeks the indulgence of an opponent or court should bear the costs consequent thereto. In certain circumstances, a party from whom indulgence is sought may be visited with costs if he withholds his consent unreasonably.

[42] Mr Jacobs argued that plaintiff is entitled to the costs relating to the exception because the proceedings were jettisoned by the filing of the notice of amendment. Mr Semenya disagreed, and submitted that plaintiff's costs in the exception should be limited to drafting only, not argument.

[43] I disagree. As stated above, plaintiff complied with the Practice Directives by filing heads of argument and practice note after it received an assurance from defendant that it would not proceed with the then notice of amendment. Defendant waited until the last hour, and instead of filing heads of argument, it filed the current notice of amendment. Plaintiff is entitled to its full costs with regard to the exception.

[44] I make the following order;

[44.1] Defendant is granted leave to amend its plea in accordance with the notice dated 15 July 2013.

[44.2] Defendant is ordered to pay costs of the application for amendment.

[44.3] Defendant is also ordered to pay the plaintiff's costs in the exception.

MAKHUBELE AJ

Acting Judge of the High Court

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