



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 94827/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
Date:	3/1/2020
Signature:	

In the matter between:

MUNRO GRIESSEL NO

First Applicant

ANEL GRIESSEL NO

Second Applicant

and

MONTSANTO SOUTH AFRICA (PTY)LTD

First Respondent

OBARO HANDEL (PTY) LTD

Second Respondent

AND

Case no: 94828/2016

GRUISBULT BOERDERY (PTY) LTD

Applicant

and

MONT SANTO SOUTH AFRICA (PTY) LTD

First Respondent

OBARO HANDEL (PTY) LTD

Second Respondent

NEUKIRCHER J:

- 1] The two matters have been set down together as the parties are substantially the same, the causes of action intertwined and the facts even more so. Thus, at the hearing of the matter, the parties agreed to argue one matter, it being agreed that whatever the outcome in the one would be the outcome for both. I thus proceed with this judgment on that basis.

RULE 28

- 2] Rule 28 provides as follows:

"28 Amendment of Pleadings and Documents

(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(3) *An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.*

(4) *If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend..."*

THE PRINCIPLES RELATING TO AMENDMENTS

3] it is trite that the granting or refusal of an amendments falls within the discretion of the court which should be exercised judicially in light of all the facts and circumstances before it¹.

4] In **Moolman v Estate Moolman**² Watermeyer J remarked

"...the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to amend was filed."

5] In **Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd**³ Caney J concluded that the primary object of allowing an amendment is *"...to obtain a proper ventilation of*

¹ *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T) at 222B-D; *Ciba-Gelgy (Pty)Ltd v Lushof Farms (Pty)Ltd* 2002 (2) SA 447 (SCA) at 462
1927 CPD 27 at 29
² 1967 (3) SA 632 (D) at 637A – 641C

the dispute between the parties..." The vital consideration in the decision whether to grant an amendment is whether the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.⁴

- 6] There are several instances where an amendment will be refused. Bearing in mind the present objections, some of these are the following:
- 6.1 where the amendment will render the pleading excipiable;
 - 6.2 where the amendment will introduce a new cause of action and new claims;
 - 6.3 or where the claims sought to be introduced have prescribed

THE PLEADING IS RENDERED EXCIPABLE

- 7] One of the grounds on which an amendment may be successfully opposed is that it is excipiable⁵. Insofar as this ground is concerned, the position is that an amendment should be refused on this basis only if it is clear that the amended leading will (not may) be excipiable⁶. If the issue of excipiability is an arguable point⁷ or if it may be cured by the furnishing of further particulars⁸ then it is proper to grant the amendment. The aggrieved party may then file an exception if he so wishes.

⁴ At 638A-B

⁵ *Gross v Ferreira* 1950 (3) SA 443 (C) at 449G-450G (and confirmed on appeal at 1951 (2) SA 435(C)

⁶ *Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355 (NmS) at 346H-I

⁷ *Pieters v Pitcher* 1959 (3) SA 834 (T); *National Union of SA Students v Meyer*; *Curtis v Meyer* 1973 (1) SA 363 (T) at 368H-369B

⁸ *Crawford-Brunt Kavnat* 1967 (4) SA 308 (C) at 310A-D

NEW CAUSE OF ACTION

- 8] There mere fact that the amendment will introduce a new cause of action or add a new claim is not, *per se* sufficient grounds to refuse the amendment and the test to be applied is the same as that applied in allowing an amendment in general: i.e. will the amendment cause such prejudice to the opposite party as cannot be remedied by an appropriate order as to costs or postponement?⁹
- 9] It is also so that an amendment which seeks to introduce a new cause of action which has prescribed will not be permitted¹⁰. But, where the issue of whether the new claim has prescribed is disputed, the application for amendment is normally not the proper forum to attempt to have that issue decided.¹¹
- 10] It would appear that the way to decide whether or not a new cause of action is sought to be introduced, is to analyse the *facta probanda* of the two claims and where there is a substantial departure, it would lead to the conclusion that a new cause of action had well been introduced

⁹ *OK Motors v Van Niekerk* 1961 (3) SA149 (T); *Van Deventer v Van Deventer* 1962 (3) SA 969 (N); *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 856-857; *Nedcor Investment Bank Ltd v Visser* NO 2002 (4) SA 588 (T) at 595

¹⁰ *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 839C-E; *Stroud v Steel Engineering Co Ltd and Another* 1996 (4) SA1139 (W) at 1142

¹¹ *Stroud v Steel Engineering Co Ltd* 1996 (4) SA 1139 (W) at 1142. It must also be borne in mind that, whilst it is usual that prescription is raised by way of a pleading, in these circumstances, it may be raised in an affidavit *Associated Paint & Chemical Industries (Pty)Ltd v Smit* 2002 (2) SA 789 (A) at 793

and the issue is then whether the prejudice to the aggrieved party is of such a nature that the amendment should be refused.¹²

THE PRESENT AMENDMENT

11] And this brings me to the present application: on 6 March 2019 the plaintiffs served their Rule 28 notice of intention to amend in response to which the defendant filed their notice of objection on 20 March 2019. This led to the present application (which is opposed) and which was delivered on 4 April 2019.

12] In the original particulars of claim, the plaintiffs plead that:

12.1 they purchased seed from the second defendant (Obaro) that was manufactured by the first defendant (Monsanto) which was infected by a fungus¹³ which led to the failure of the plaintiff's crop which resulted in a reduced harvest;

12.2 the claim is a delictual claim for damages based on Monsanto's alleged wrongful or negligent conduct in relation to the seeds which caused the failed crop and reduced harvest..

13] In the amendment, the plaintiffs seek to do the following:

¹² See for example *Imprefed (Pty) Ltd v National Transport omission* 1990 (3) SA 324 (T) at 329B-C where the court analysed the claim and found that although the amount claimed after the amendment was the same as that claimed previously, the *facta probanda* were quite different in that the original claim had been for contractual remuneration whereas the amended claim was in respect of damages for breach of contract. In *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE), the court held that although there were differences between the *facta probanda* of the original claim and those of the claim as amended, the causes of action were not so separate and distinct that the plaintiff was seeking to enforce a substantially different cause of action from that pleaded originally.

¹³ Known as *fusarium verticilliodes*

- 13.1 firstly, and based on the provisions of Section 61 of the Consumer Protection Act no 68 of 2008 (the CPA), claim damages against the defendants;
- 13.2 in the alternative the plaintiff claims damages based on negligence:
 - 13.2.1 against Monsanto on the basis that it had *“a legal duty towards the public at large, and/or the farming fraternity, and/or the plaintiffs”* to ensure that the seed was not infected and/or did not suffer from deficits which could cause harm or damage to the land users of the seed and that it had breached this legal duty; and
 - 13.2.2 against Obaro on the basis that it had breached an oral agreement by:
 - 13.2.2.1 delivering seed that was contaminated with the fungus;
 - 13.2.2.2 *“ill-advising”* the plaintiffs on the suitability of the seed for cultivating under certain conditions specified in the amendment.
- 14] It is apparent from Mr McNally's argument that the amendment pertaining to the breach of the legal duty is not truly in contention¹⁴, but

¹⁴ This claim against Monsanto still being based on delict

the claims based on the provisions of section 61 of the CPA and on the oral agreement are. In this regard the main thrust of the defendants objections are that:

- 14.1 the provisions of the CPA are not applicable to the present action and, even if they were, this new cause of action has prescribed;
- 14.2 the introduction of the claim based on an oral agreement is a new cause of action;
- 14.3 whatever the situation, both these amendments are not permitted and are excipiable.

THE AMENDMENT RE THE CPA

15] Section 61 of the CPA reads as follows:

"61 Liability for damage caused by goods

(1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of-

- (a) supplying any unsafe goods;*
- (b) a product failure, defect or hazard in any goods; or*
- (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,*

irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

(2) A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section.

(3) If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several.

(4) Liability of a particular person in terms of this section does not arise if-

(a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;

(b) the alleged unsafe product characteristic, failure, defect or hazard-

(i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or

(ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;

(c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or

(d) the claim for damages is brought more than three years after the-

(i) death or injury of a person contemplated in subsection (5) (a);

- (ii) *earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5) (b); or*
- (iii) *earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5) (c); or*
- (iv) *the latest date on which a person suffered any economic loss contemplated in subsection (5) (d).*

(5) Harm for which a person may be held liable in terms of this section includes-

- (a) the death of, or injury to, any natural person;*
- (b) an illness of any natural person;*
- (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and*
- (d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).*

(6) Nothing in this section limits the authority of a court to-

- (a) assess whether any harm has been proven and adequately mitigated;*
- (b) determine the extent and monetary value of any damages, including economic loss; or*
- (c) apportion liability among persons who are found to be jointly and severally liable."*

16] The objection to the amendment is that, not only does this claim constitute a new cause of action, but given the provisions of s61 of the

CPA, the plaintiffs are excluded from the application of its provisions and thus the amendment is excipiable. The basis for the second half of the objection lies therein that the CPA excludes from its application all juristic persons whose asset value or annual turnover exceeds R2 million at the time of the transaction.¹⁵

17] what this objection misses, in my view, is that s5(5) of the CPA states:
"(5) If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61." (my emphasis)

18] For purposes of the above the following definitions are provided for in the CPA:

18.1 a "transaction" is

"(a) in respect of a person acting in the ordinary course of business-

(i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or

¹⁵

Section 5(2)(b) which states:

"(2) This Act does not apply to any transaction-

... (b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6..."

- (ii) *the supply by that person of any goods to or at the direction of a consumer for consideration; or*
- (iii) *the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or*
- (b) *an interaction contemplated in section 5 (6), irrespective of whether it falls within paragraph (a);"*

18.2 a "producer" is

" **'producer'**, with respect to any particular goods, means a person who-

- (a) *grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or*
- (b) *by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a);"*

18.3 an "importer" is

" **importer'**, with respect to any particular goods, means a person who brings those goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business;"

18.4 a “distributor” is

“ ‘distributor’, in relation to any particular goods, means a person who, in the ordinary course of business-

(a) is supplied with those goods by a producer, importer or other distributor; and

(b) in turn, supplies those goods to either another distributor or to a retailer;”

18.5 a “retailer” is

“ ‘retailer’, with respect to any particular goods, means a person who, in the ordinary course of business, supplies those goods to a consumer;”

19] Mr de Koning submitted that Monsanto can clearly fall under any of the above definitions, and I agree. I am also of the view that the provisions of s61 do not appear to be limited to consumers who suffered harm as from a reading of the definition of “consumer”¹⁶ the plaintiffs fall within that definition:

“ [46] In *Eskom Holdings*’ para 15 the court stated as follows:

¹⁶ “in respect of any particular goods or services, means-

(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5 (2) or in terms of section 5 (3);

(c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and

(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5 (6) (b) to (e);”

¹⁷ *Eskom Holdings Ltd v Halstead-Cleak* 2017 (1) SA 333 (SCA)

'The definition of consumer in s 1 is a person to whom goods or services are marketed in the ordinary course of a supplier's business, or who has entered into a transaction with a supplier in the ordinary course of a supplier's business. The definition includes a person who is a user of the goods or a recipient or beneficiary of the particular service irrespective of whether that person was a party to a transaction concerning the supply of the goods or services. This has the effect that the recipient of a gift from a consumer would also be considered a consumer in terms of the Act. The important features to note are that there must be a transaction to which a consumer is party, or the goods are used by another person consequent on that transaction.'

[47] *From the definitions, the preamble and purpose of the CPA, as detailed in the Eskom Holdings decision, and restated above, it is clear that the whole tenor of the Act is to protect consumers. A consumer is a person who buys goods and services, as well as persons who act on their behalf or use products that have been bought by consumers. There are categories of persons who fall outside this definition, but they are deemed to be consumers in terms of the provisions of s 5(6) as set out above. These purchases are made by way of transactions. The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers.¹⁸*

¹⁸ *Telikom Residential Property Fund Ltd v Matl and Others* 2018 (4) SA 515 (WCC)

- 20] Thus, given all the above, *prima facie* the provisions of the CPA would be applicable to Monsanto as an importer, producer, distributor or retailer.
- 21] Furthermore, the claim formulated in terms of s61 of the CPA as set out in the amendment contains sufficient particularity to allow the defendants to plead and thus the claim is not vague and embarrassing.
- 22] I also do not agree that this claim is an entirely new cause of action which bears no relation to that which has been pleaded by the plaintiffs in their particulars of claim. In my view the basis of this claim has been pleaded in the original particulars, and the fact the plaintiffs have now clarified a statutory provision in support of this claim does not create a new cause of action.
- 23] The above does not preclude the defendants from either filing an exception in due course, or a Special Plea or taking any further steps to found facts to support the facts raised in argument.

THE ORAL AGREEMENT

- 24] Mr McNally has submitted that, in determining whether this amendment should be allowed, the court should bear in mind that the new cause of action has at its heart a debt that is significantly different to the original cause of action. He submits that the debts in the original claims were

both for patrimonial loss arising from the delictually wrongful and negligent conduct of the defendants. In the amendment, the debts are for positive *interesse* arising from breach of contract.

- 25] He has submitted that, bearing in mind the requirements set out in **Sentrachem Ltd v Prinsloo**¹⁹, this claim is not recognisable from the original pleading, and the amendment does not simply clarify a defective or incomplete pleading. I disagree.
- 26] The original particulars of claim have set out the agreement between the parties relating to the sale of the seed and the representations and recommendations made by the defendants' representatives. This amendment simply builds on that and clarifies the original pleading. I am therefore of the view that this amendment does not introduce a new cause of action

PRESCRIPTION

- 27] Mr McNally has submitted that, whatever the situation as regards the two amendments, the debts as pleaded by the plaintiffs in the amendment have become prescribed.

¹⁹ 1997 (2) SA 1 (A) at 16J-17B : "Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesenlik dieselfde skuld prober afdwing. Die SKuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg waarop daar deurgans gesteun is, uiteengesit word."

28] He submits that, s 10 of the Prescription Act 68 of 1969, as read with s11(d), makes provision for a debt to be extinguished by prescription after the lapse of 3 years from the date upon which it became due.

29] s12 of the Prescription Act provides:

"When prescription begins to run

(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises²⁰: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

30] Given that the plaintiffs allege that they planted the seed over the period of August to December 2015, the fact that the plaintiffs lodged a complaint with the defendants regarding the seed at the end of January 2016, the plaintiffs reliance (for quantification of their claim) on the SAFEX price of 12 February 2016 and the claim for interest from 12 February 2016, the argument is that the plaintiffs claim prescribed prior to the Rule 28 notice delivered on 6 March 2019.

²⁰

Which are the minimum requirements for knowledge of the existence of the debt : *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) at [9]

31] Mr de Koning has submitted that the plaintiffs have alleged that they factually established on or about 30 May 2016 that their crop failure was caused by the contaminated seed and that, as a result, the Rule 28 notice was well within the prescription period.

32] *Prima facie* this is correct and, in any event, given that I find that neither amendment introduces a new cause of action, this issue need not be deliberated further.

CONCLUSION

33] Thus, in my view, the plaintiffs proposed amendment should be allowed.

COSTS

34] Mr McNally has submitted that the opposition to the amendment has been neither vexatious, nor frivolous nor unreasonable and thus, even were the objection to fail, the plaintiffs should not be awarded costs. Mr de Koning has submitted that costs should follow the result.

35] This amendment and the objections thereto are substantial and required full ventilation. In my view the objection, although unsuccessful, should not be visited with a costs order as the defendants were certainly entitled to ventilate the objections fully. I cannot say that any of the objections were vexatious, frivolous or unreasonable and I


am therefore of the view that in this instance the usual order that costs should follow the result should be departed from, and that each party should bear their own costs.

ORDER

[6] Thus the order I make is the following:

36.1 the amendment is allowed;

36.2 each party is to pay its own costs.



NEUKIRCHER J

JUDGE OF THE HIGH COURT

Date of hearing: 19 August 2019

Date of judgment: 30 December 2019

For plaintiff:	Adv LW de Koning SC
Instructed by:	Linda Erasmus Attorneys
For defendant:	Adv McNally SC
Instructed by:	Webber Wentzel Attorneys