IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:14490/2018

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

18/02/2022
DATE

[redacted]
SIGNATURE

In the matter between:

CS HENTIQ 1009 PROPRIETARY LIMITED

Whose name was changed to

KHULANI FORESTS (PTY) LTD First Applicant

And

BZ ZELF PROPRIETARY LIMITED

whose name was changed to

KHULANI SAWMILLS PROPRIETARY LIMITED Second Applicant

and

NATIONAL EMPOWERMENT FUND Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an interlocutory application for leave to amend particulars of claim in terms of Rule 28(1) of the Uniform Rules of Court. For clarity, the parties are referred to herein as in the main action between them. The Applicants are the Plaintiffs in the main action and the Respondent is the Defendant. The defendant has filed a notice in terms of Rule 28(2) marking its objection to the amendments sought by the Plaintiffs on the grounds that the sought amendment not only amounts to a withdrawal of facts admitted by the Plaintiff and set out in the original plaintiffs' particulars of claim. The relevant facts, also admitted by the Defendant, form the basis of the Defendant's counterclaim against the Plaintiffs. In addition to the withdrawal of admitted fact by the Plaintiff, the proposed amendments introduce a new cause of action that has legally and effectively prescribed.

THE PARTIES

[2] The First Plaintiff is **CS HENTIQ 1009 (PTY) LTD,** whose name was changed to **KHULANI FORESTS (PTY) LTD** on 26 July 2013, a private company duly registered and incorporated as such in terms of the company laws of the Republic of South Africa with chosen *domicilium* address at Berghoek Plantation, Mpumalanga, 1109.

[3] The Second Plaintiff is **BZ ZELF (PTY) LTD,** whose name was changed to **KHULANI SAWMILLS (PTY) LTD** on 11 December 2013, a private company duy registered as such in terms of the company laws of the Republic of South Africa with chosen *domicilium* address at Portion 5 of the farm Vriesland 650, registration division JT, Mpumalanga.

[4] The Defendant is the **NATIONAL EMPOWERMENT FUND,** a statutory Trust established in terms of the National Empowerment Fund Act 105 of 1998 with registration number IT 10145/00 in terms of Section 4 (1) of the NEF Act 105 of 1998. The Defendant has the capacity to, inter alia, sue or be sued in its own name. The Defendant's principal place of business is situated at West Block 187 Rivonia Road, Morningside, Johannesburg, Gauteng Province.

FACTUAL MATRIX

[5] The First and Second Plaintiffs in are separate legal entities with individual and distinct business premises, but integrally connected and co-dependant as a result of their respective operations of a forestry and sawmill businesses, respectively. The First Plaintiff plants, grows and harvests trees which it supplies/sells to the Second Plaintiff who processes the harvested trees and cut them into different timber size of planks which are then sold to the public.

[6] The Defendant financed the business of the Plaintiffs for the purpose of facilitating and securing a shareholding for the employees of the applicants in the forestry and saw mill industry, in line with its statutory mandate in terms of the National Empowerment Act.

THE LOAN AMOUNTS, AGREEMENTS AND SECURITIES

FIRST PLAINTIFF AND DEFENDANT'S AGREEMENT

[7] The First Plaintiff and the Defendant entered into a written Senior Loan Facility Agreement at Sandton on or about the 12 June 2012 in terms of which the Defendant made available to the First Plaintiff a loan facility in the order of R7 450 000,00 (Seven million four hundred and fifty thousand rand). As a partial security for the facility, the parties entered into and registered a General Notarial Bond in terms of which the First Plaintiff hypothecated all its movable property in favour of the Defendant to the tune of R200 000-00 (Two hundred thousand Rand) and a further R40 000-00 (Forty thousand Rand).

[8] As additional security for the loan mentioned above, the First Plaintiff hypothecated its immovable property to and in favour of the Defendant. The property concerned is described as 'the Farm Berghoek 751, Registration Division JT, Mpumalanga and the Farm Uitsig 568, Registration Division JT. The relevant General Covering Bond was registered on or about the 16 August 2012 in the amount of R7 450 000-00 (Seven million four hundred and fifty Rand) and an additional amount of R1 490 500-00 (One million four hundred and ninety thousand five hundred Rand).

SECOND PLAINTIFF AND THE DEFENDANT AGREEMENT

[9] On or about the 9 October 2012 and at Sandton, the Second Plaintiff and the Defendant entered into a written Senior Loan Facility Agreement in terms whereof the Defendant made available to the Second Plaintiff a loan facility in the amount of **R4 708 878-60** (Four million seven hundred and eight thousand eight hundred and seventy eight rand and sixty cents).

[10] On the 21 January 2015 the Second Plaintiff and the Defendant concluded an addendum approving an additional amount of **R560 000-00** (Five hundred and sixty thousand rand) and amending the total amount of the loan to **R6 160 000-00** (Six million one hundred and sixty thousand rand) -

[11] As a partial security for the above loans in paragraphs 9 and 10, above, and on or about the 26 September and at Mpumalanga, a General Notarial Covering Bond was registered by the Second Plaintiff in favour of the Defendant under Bond Number 7542/2012. In terms of the said bond, the Second Plaintiff bonded and hypothecated all its movable property unto and in favour of the Defendant to the extent of R891 121-40 plus an additional amount of R137 800-00.

[12] In terms of the two agreements, the Defendant loaned and advanced a total amount of **R8 195 000-00** to the First Plaintiff and **R13 857 676-15** to the First and Second Defendants, respectively.

APPLICABLE TERMS AND CONDITIONS OF THE LOAN AGREEMENTS

[13] EVENT OF DEFAULT

13.1 An event of default shall occur if:-

13.1.1 The Borrower fails to pay any amount due pursuant to this Agreement strictly on due date and fails to remedy such failure within the period set out in 12.1.14;

13.1.2 The Borrower breaches any warranty given by it pursuant to clause 10 above and, if such warranty is capable of being remedied, falls to remedy it within 14 (Fourteen) Business Days of being called upon in writing by the Lender to do so, or within such period as may be reasonable in the circumstances;

13.1.4 The Borrower commits a breach of the Suspensive Sale Agreement;

13.1.8 The Borrower utilises the Facility for purposes other than contemplated in this Agreement;

13.2 If an event of default occurs, the Lender shall be entitled to, in addition to any other rights it may have: -

13.2.1. Suspend performance of any obligation owed by the Lender to the Borrower in terms of any agreement concluded between the

two, including but not limited to refuse to allow the Borrower to make any further Draw Downs against the Facility and;

13.1.2. On the giving of written notice to the Borrower, demand that the Borrower, within 30 (thirty) Business Days after receipt of the aforesaid notice discharge the whole of its indebtedness to the Lender, which amount shall be the aggregate of all amounts which have become payable in respect pf the Facility, whether in respect of the principal, interest or otherwise, which are outstanding, as well as paying to the Lender as cash security, an amount determined by the Lender to secure the Lender against its maximum potentially liability in respect of any conditional indebtedness, or indebtedness the amount of which has still to be determined;

13.2.6. Sell, surrender or otherwise realise any other assets furnished as security and/or

13.2.7. Cancel this Agreement and institute an action for damages against the Borrower;

13.3. The Lender may exercise any of these rights and any other rights it may have together or separately and at any time and in any order.

DEFAULT

[14] The Plaintiffs had previously admitted to breaching the terms of the loan agreements by employing a part(s) of the loaned amounts in other business ventures that did not form part of and/or serve the purpose for which the loans

were made available. During or about August 2017, the Plaintiffs fell in arrears with the repayments of the loaned amounts, a fact that they have acknowledged in paragraph 13 of the original particulars of claim and which the sought amendment seeks to expunge.

[15] The Defendant delivered a notice of demand on the Defendants on or about the 5 September 2017 demanding payments of the full outstanding balances plus interest within 3 days.

PERFECTION OF THE BONDS

[16] On the 17 September 2017 and upon failure by the Plaintiffs to meet the demand, the Defendant took occupation of the Second Plaintiff's premises, that is, the sawmill and employed a security company to keep the premises under guard with instructions not to allow the Plaintiffs access to the premises and the movable assets thereon.

[17] Notwithstanding the failure to meeting the Defendant's demand for the full repayment of the loans and interest, the plaintiffs' attorneys wrote to the Defendant on the 18 September 2017 advising it that the Plaintiffs had an order for timber and demanded the restoration of the possession of the premises and access to the use of the equipment. The Plaintiffs accused the Defendant of unlawfully displacing them from the premises of the sawmill and disturbing their peaceful possession and use of the equipment thereon and thereby preventing them from doing business and earnings of hundreds of millions of rand – the subject of the claim for damages in the sought amendment of the plaintiffs' particulars of claim.

[18] The Defendant responded by launching an urgent application to court for hearing on the 4 October 2017 seeking an order in terms of which it sought to perfect it security. However, the Defendant did not proceed as the application

became opposed by the Plaintiffs, preferring instead for the application to be heard in the opposed motion court. That application has not been withdrawn and is still pending. A further delay of that application was occasioned by interlocutory unsuccessful applications the Plaintiffs' had brought against the Defendant in purported attempts to regain possession of the premises and the equipment thereon.

[19] On the 20 November 2017 and as a result of the Defendant's steadfast refusal to give the Plaintiffs access to the premises, the Plaintiffs' attorneys wrote to the Defendant's attorneys cancelling the agreements relating to the First Plaintiff. The Plaintiffs alleged that the Second Plaintiff had followed suit, an allegation the Defendant denied. The Plaintiff however failed to provide the relevant proof.

[20] On the 5 March 2018 the Plaintiffs instituted action proceedings against the Defendant seeking orders that;

A. In respect of the First Plaintiff;

20.1 The agreements between the First Plaintiff and the Defendant be cancelled;

20.2 The security in the form of a Notarial bond be cancelled;

20.3 The General Covering Mortgage Bond be cancelled;

20.4 Payment of the amount of R100 000 000,00;

20.5 Interest thereon at the rate of 15% a tempora mora (sic);

20.6 Pending payment of the capital amounts advanced by the Defendant to the 1st Plaintiff until such time as the damages claims of the 1st and Second Plaintiffs have been adjudicated and set-off against the said capital amounts;

20.7 Costs of suit.

B. In respect of the Second Plaintiff that;

20.8 the agreements between the Second Plaintiff and the Defendant be cancelled;

20.9. the security in the form of a Notarial General Bond be cancelled;

20.10 the Defendant pays the Second Plaintiff the amount of R350 000 000,00 in damages;

20.11. interest thereon at the rate of 15% a tempora mora (sic);

20.12 pending payment of the capital amounts advanced by the Defendant to the Second Plaintiff until such time as the damages claims of the First and Second Plaintiffs have been adjudicated and set-off against the said capital amounts.

20.13 costs of suit.

[21] For the relief /orders sought above, the Plaintiffs seek to rely essentially on four grounds, namely;

21.1 that the Plaintiffs have maintained regular repayments of the loaned amounts.

21.2 Secondly, the agreements between the Plaintiffs and the Defendant, particularly the clauses thereof on which the Defendant relies, were contrary to public policy and, therefore, unenforceable.

21.3 In the third instance, the Plaintiffs aver that the actions of the Defendant were unlawful and deprived the Plaintiffs of business opportunities causing them a loss of income. The Plaintiffs seek a payment of damages as a result.

21.4 Lastly, the Plaintiffs seek to premise their claims on the Defendant's taking occupation of the premises of the Second Plaintiff – an event that occurred on 17 September 2017

APPLICABLE LEGAL PRINCIPLES

[22] The right to amend pleadings is not a given and will not be granted unless the court is satisfied, firstly, of the reasons for the amendment and having regard to the prejudice the amendment may occasion to the other party. The Plaintiffs' assertion that they have a right to seek an amendment at any time and in any manner fails to recognise the importance of the consideration of the rights of the other party. It is inconceivable that a party may seek to assert its right to by invoking the provisions of section 34 of the Constitution to justify a situation, as is the case herein, where the exercise of that right will invariably cause prejudice to the other party.

[23] The amendment sought by the Plaintiffs seeks to expunge an admission of default by the Plaintiffs and, noteworthy, it stands to completely displace the Defendant from its position after the close of pleadings. The introduction of new causes of action will require that the Defendant pleads anew. The Constitutional

Court in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) enunciated the applicable principle in the following terms:

> "[9]...*Amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purpose of justice in the same position as they were when the pleading which it is sought to amend was filed."*

The withdrawal of an acknowledged breach of the agreement inherent in the sought amendment points to mala fides on the part of the Plaintiffs.

[24] In addition to the principle aforementioned, in *Krogman v Van Reenen* 1926 OPD 191 at 195, the Court emphasised that a proposed amendment must raise a triable issue that is of sufficient importance to justify the prejudice and costs to the other parties and the Court. The introduction of new causes of action and the withdrawal of an admitted breach of the agreement by the Plaintiffs fails the muster in this regard. The Defendant stands to suffer overwhelming prejudice were the amendment to be granted.

[25] A 'satisfactory explanation' is required for the intention to withdraw an admission. [see *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1150]. The circumstances in the present matter are aptly encapsulated in the Court's findings in President Versekeringsmaatskappy Bpk v Moodley 1964 (4) SA 109 (T) in the following terms:

> *" The approach is the same [as for other admissions], but the*

withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the court of the bona fides thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason have omitted to gather the necessary evidence." (own emphasis).

[26] The Plaintiffs' failure to give a full and satisfactory explanation for the deficits in the particulars of claim and absence of an affidavit by the Plaintiff's erstwhile attorneys explaining the erroneous admissions leaves much to be desired and casts doubt in the Plaintiffs' bona fides. It is a well established principle that: *"when a client alleges a breach of duty by an attorney, the privilege is waived as to all communications relevant to that issue"*. [see *S v Boesman* 1990 (2) SACR 389 (E) 394 G - H, cited with approval in *S v Tandwa and Others* 2008 (1) SACR 613 (SCA) at para 20 where the Court said the following:

"[20] *The canon seems to us to be clearly right. Where an accused charges a legal representative with incompetence or neglect giving rise to a fair trial violation it seems to us most sensible to talk of imputed waiver rather than to cast around to find an actual waiver. Even without an express or implied waiver, fair evaluation of allegations will always require that a waiver be imputed to the extent of obtaining the impugned legal representative's response to them. Rightly therefore, counsel on appeal accepted that the advocate's affidavit was*

admissible in assessing the accused's claims."

[27] In the Boesman case the Court admitted evidence from advocates who were accused by their former clients of making admissions on their behalf in error. Zietsmann J held that:

> *"Where, as has happened in this case, the accused have elected to give evidence concerning the instructions given by them to their counsel, and where they seek to withdraw admissions made by their counsel on their behalf on the ground that their counsel acted contrary to their instructions in making the admissions, they have waived the privilege attaching to the communications made by them to their counsel in that regard, and the element of fairness referred to in the passage in Wigmore, quoted by Rumpff JA in Wagner's case, requires that the State should be allowed to call the counsel concerned to give evidence concerning such communications."*

[28] It is consequently a fallacy on the part of the Plaintiffs in this matter to entertain the thoughts of the success of this application on the basis of the imputation of unsubstantiated blame for their admissions of default on their erstwhile attorneys. The allegations of having made regular payments towards the reduction of the loan amounts fly in face of the admissions of the Plaintiffs' to have defaulted in payments of the loans in August 2017. In addition, the Plaintiff have not demonstrated that they are not themselves to blame, be it wholly or partially, for the alleged erroneous admissions. The Appellate Division

stated in *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141.that:

> *''There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency or explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations and misericordiam should not be allowed to become an invitation to laxity ....if he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case."*

[29] In relation to time, it has taken an unreasonably substantial period for the Plaintiffs to bring this application. The summons was issued over three years ago. The judgment dismissing the Plaintiffs' Rule 33(4) application was handed down some two years ago, the mandate of the Plaintiffs' former attorneys was terminated in 2019 and the present attorneys appointed. No explanation whatsoever is given for the delay, particularly the delay of more than a year after the appointment of the present Plaintiffs' attorneys who proposed the bringing of this application. The Court held in Zarug v Parvathie NO 1962 (3) SA 872 (D) at 876C that:

> *"If the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay."*

[30] Unexplained delays are a necessary consideration in the assessment of whether the application is brought in good faith and whether the delay itself is not a calculated mechanism to prejudice the other party [see *Trans-Drakensberg Bank Limited (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640].

CONCLUSION

[31] The amendment sought by the Plaintiffs entailing the withdrawal of their entire particulars of claim to which the Defendant had already pleaded and which effectively expunges admitted facts cannot be justified. The introduction of new causes of action at a stage where the pleadings had already closed is procedurally flawed. In any event, in my view, taking into account the principles in the various cases as cited above, the Plaintiffs have failed to satisfy this Court that the amendment is sought on bona fide grounds. The application ought, therefore, fail.

COSTS

[32] The general principle is that costs follow the outcome of the case. The conduct of the Plaintiffs found to be wanting in almost every respect points to this application being a typical abuse of process. It is on this basis that I find the Defendant's prayer for a punitive costs order justified.

ORDER

[33] In the light of the findings in this judgment the following order is made:

1. The application for the amendment of Plaintiffs particulars of claim is dismissed.

2. The Plaintiffs are jointly ordered to pay the costs of this application on an opposed attorney and own client scale, the one paying the other to be absolved.

[redacted]

M. MBONGWE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

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Date of hearing: 07 September 2021

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES/ LEGAL REPRESENTANTIVE ON THE 18 FEBRUARY 2022.