



**IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA
KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG**

REPORTABLE

CASE NO: 5864/2016

APPEAL CASE NO: AR 41/2020

In the matter between:

GEARWISE PROPERTIES CC

and

TBP BUILDING AND CIVILS

(PTY) LTD (IN LIQUIDATION)

GUARDRISK INSURANCE COMPANY

(PTY) LTD

CONSOLIDATED AONE TRADE

AND INVEST 6 (PTY) LTD (IN LIQUIDATION)

IMPERIAL CROWN TRADING 176

(PTY) LIMITED (IN LIQUIDATION)

FIRSTRAND BANK LTD

THE MASTER OF THE HIGH COURT,

DURBAN

THE MASTER OF THE HIGH COURT,

PIETERMARITZBURG

THEODORE WILHELM VAN DEN

HEEVER N.O

KRISHNA RUBEN VENGADESEN N.O.

EBRAHIM ABOOBAKER MOOLA

THEODORE WILHELM VAN DEN

APPELLANT

FIRST RESPONDENTS

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

SIXTH RESPONDENT

SEVENTH RESPONDENT

EIGHTH RESPONDENT

NINTH RESPONDENT

TENTH RESPONDENT

ELEVENTH RESPONDENT

HEEVER N.O

EUGENE NEL N.O

MDUDUZI CHRISTOPHER NKOMO N.O

FATIMA CASSIM N.O

NEIL DAVID BUTTON N.O

MANDLA PROFESSOR MADLALA N.O

TWELFTH RESPONDENT

THIRTEENTH RESPONDENT

FOURTEENTH RESPONDENT

FIFTEENTH RESPONDENT

SIXTEENTH RESPONDENT

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg/Durban (D Pillay J sitting as court of first instance):

- (a) The appeal against paragraphs b, c, and d of the order of the learned Judge D Pillay is upheld;
 - (b) Paragraphs b, c and d of the aforesaid order are set aside;
 - (c) The second respondent is ordered to pay the costs of the opposed appeal;
 - (d) The costs of the application for leave to appeal against the order of the court below and the costs of the application for leave to appeal to the Supreme Court of Appeal shall be costs in the appeal.
 - (e) The appellant is ordered to pay the costs of its application for amendment;
 - (f) With regard to the costs of the exception argued by the appellant and the second respondent, each party is to pay its own costs.
 - (g) The draft consent order prayed by the appellant and the third, fifth, eleventh, twelfth and thirteenth respondents is granted.
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APPEAL JUDGMENT

Madondo DJP

Introduction

[1] Gearwise Properties CC, the appellant, appeals against the order of the learned Judge D Pillay of 5 September 2018 granting the appellant's application to amend its particulars of claim, and at the same time declaring the very amended particulars of claim excipiable. The learned judge then proceeded to give the appellant fourteen (14) days to amend its particulars of claim, and, in addition, ordered the appellant to pay the costs of the application to amend and the exception, and which costs were to follow the results.

[2] The appellant grounds its appeal against the order of the court a quo, mainly, on the allegation that the court a quo erred in that after it had granted its application to amend its particulars of claim, it proceeded to hold the appellant's amended particulars of claim excipiable in the absence of a new exception taken to such amended particulars of claim.

Factual background

[3] The factual background to this appeal is that during 2009 the third respondent sold its vacant immovable property to the fourth respondent for R45 million to enable the fourth respondent to construct the Ballito Bay Shopping Mall (the mall) thereon for its sole benefit and profit. Pursuant to the sale of the immovable property, construction of the mall commenced but before it could reach completion the third respondent purported to cancel the agreement of purchase and sale. However, prior to the purported cancellation of the sale of the immovable property, the fourth respondent contracted with the appellant to construct the mall and the appellant, in turn, subcontracted with the first respondent to construct the mall. The first respondent only constructed part of the mall and then abandoned the construction site. Thereafter, the

fourth respondent requested the appellant to complete the construction of the mall. The fourth respondent ultimately failed to pay the appellant the balance of the contract price for the construction of the mall in the sum of R215 234 363.69, and as a result the appellant instituted an action against the fourth respondent under case no: 674/2013 for the payment of such sum, which action is pending before this court. In completing the construction of the mall, the appellant incurred expenses in the sum of R172 650 543.30, being the costs of materials and construction. As a result of the appellant's construction and completion of the mall, the market value was allegedly enhanced by R250 million. The appellant built the mall at its own expense, having been contracted by the fourth respondent to do so. The third respondent did not pay anything for the construction of the mall but it claimed that the building acceded to its land. The appellant is owed a substantial sum for the balance of the contract price due to it by the fourth respondent.

[4] The appellant then instituted an action against the respondents, and amongst the declarator and alternative relief it sought, was judgment in the sum of R172 630 453 against the third respondent on the grounds of unjust enrichment in claim B. In claim C, the appellant sought a mandatory interdict compelling the second respondent to lodge a claim against the third respondent's insolvent estate on the appellant's behalf for unjust enrichment in the sum of R172 630 534, alternatively compelling the first respondent to do so. Only claims B and C are relevant for the determination of this appeal.

[5] On 10 October 2016, the second respondent excepted to the appellant's original particulars of claim on the basis that they were vague and embarrassing, alternatively lacked averments which were necessary to sustain a valid cause of action. Prior to the exception being taken, the second respondent delivered a notice in terms of rule 23(1) of the Uniform Rules of Court requesting the appellant to remove certain causes of complaint. The third, fourth, eleventh, twelfth and thirteenth respondents on 15 June 2016 also delivered an exception to the appellant's particulars of claim. Subsequent thereto, the appellant on 19 October 2016 filed a notice that it intended to amend its particulars of claim. On 7 November 2016 the second respondent objected to the proposed amendment. However, the third, fifth, eleventh, twelfth and thirteenth

respondents did not oppose the amendment but only excepted to the particulars of claim. The remaining respondents in the case did not participate in the interlocutory proceedings.

[6] The appellant brought an application to amend on 18 November 2016. The third, fifth, eleventh, twelfth and thirteenth respondents conceded on the date of hearing that if the plaintiff's amendments were granted, their exception would fall away. They participated in the proceedings solely on the question of the costs of their exception. At the outset of its judgment, the court a quo granted the application to amend without any qualification or reservation in this regard. The court a quo then proceeded to determine whether or not the amended particulars of claim were excipiable. The court a quo found that the appellant did not meet the requirements for pleading unjust enrichment in that it failed to allege in its particulars of claim that it was impoverished by the alleged unjust enrichment. The court went on to hold that if the appellant were to succeed on its claim against the fourth respondent, the appellant would not be impoverished. In this regard the court a quo relied on the decision in *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n ander*.¹ The court a quo also went on to hold that the appellant had failed to establish a cause of action for an order for specific performance in claim C.

[7] Dissatisfied with this judgment, the appellant sought leave to appeal in the court below which was refused with costs. It then petitioned the Supreme Court of Appeal (SCA), which granted leave to appeal to the Full Court of this Division. The SCA directed that the costs order dismissing the application for leave to appeal to the SCA and in the court below were to be costs in the appeal.

Discussion

[8] The rationale for the court a quo in allowing the amendment of the appellant's original particulars of claim was to obtain a proper ventilation of the dispute between the parties and to determine the real issues between them so that justice might be done.

¹ *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n ander* 1996 (4) SA 19 (A) at 28-29

Nowadays it is preferable to try cases upon their true issues rather than upon technical points.²

[9] An application to amend is interlocutory in nature and the order made in this respect is, generally, not appealable as it is not final in effect, not definitive of the rights of the parties nor is it dispositive of any substantial portion of the relief sought in the main proceedings.³ Section 17(1) of the Superior Courts Act,⁴ makes provision for the circumstances in which a judge may grant leave to appeal:

‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[10] An interlocutory order may be appealable where the court below has erred and made an order which is not competent to correct, alter or set aside.⁵ In *Molotlegi*,⁶ the court below had pronounced itself unequivocally and definitely on the issues of the defamatory nature of the utterances as well as whether the utterances were wrongful and made with the requisite *animus iniurandi*. Once the court had pronounced itself on those issues, it was not possible for it to correct or alter that finding. In the present matter, the order has been rendered appealable since the SCA has been of the view that it would be in the interests of justice to grant leave to appeal as the court below had erred by *mero motu* holding the appellant’s amended particulars of claim excipiable. It could not of itself correct or set aside such order.

² *Baeck and Co (SA) (Pty) Ltd v Van Zummeran and others* 1982 (2) SA 112 (W) 118H;

³ *Zweni v Minister of Law and Order* 1993 (1) SA 523J- 533A.

⁴ Superior Courts Act 10 of 2013.

⁵ *Molotlegi and another v Mokwalase* [2001] 4 All SA 258 (SCA).

⁶ *Molotlegi and another v Mokwalase* [2001] 4 All SA 258 (SCA).

[11] The court below, as the court hearing the application for amendment, had a discretion whether or not to grant it. However, the weight of the decided authorities supports that:

‘The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If however there be any grounds, the question of whether they are sufficient is entirely for the Judge at the trial and this Court cannot interfere with his discretion.’⁷

[12] A pleading may be excipiable only if no possible evidence may be led on such pleadings so as to disclose a cause of action.⁸ Rule 18(4) of the Uniform Rules of Court requires that every pleading must

‘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 particularity to enable the opposite party to reply thereto.’

But it does not necessarily follow that the pleading must cover every piece of evidence a pleader intends to lead at the trial. If the need arises for further information, the opposite party may ask for further particulars in that regard.

[13] In the present matter, the court a quo exercised its discretion and granted the amendment sought. It then proceeded to hold *mero motu* that the appellant’s particulars of claim lacked a necessary averment that the appellant was impoverished by the unjust enrichment and concluded that such lack rendered the amended particulars of claim excipiable. In granting the amendment, the learned judge must have formed the view that the amendment sought passed muster in that it was not excipiable, otherwise an application for amendment should not have been granted.

[14] It is assumed that the granting of the amendment cured the defects complained of in the appellant’s original particulars of claim, and therefore, in the absence of a valid

⁷ *Ritter v Godfrey* [1920] 2 KB 47 at 53 as quoted in *Merber v Merber* 1948 (1) SA 446 (A) 452 – 453; *Logistic Technologies (Pty) Ltd v Coetzee and others* 1998 (5) SA 1071 (W) 1073J – 1074E; see also the following *Robinson v Randfontein Estates Goldmining Company Co Ltd* 1921 AD 168 at 243; *Viljoen v Bajnath* 1974 (2) SA 52 (N) at 53H; *Caxton Ltd and others v Reeve Forman (Pty) Ltd and another* 1990 (3) SA 547 (A) at 565G.

⁸ *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.

exception to the now amended particulars of claim, it was no longer competent for the court a quo to consider the question of the excipiability of the amended particulars of claim.⁹

[15] The amendment sought by the appellant and granted by the court below then became the matter for trial. If the amendment sought would have the effect of rendering the amended particular of claim excipiable, the court below ought not to have granted it, and afforded the appellant a further opportunity to cure the defects complained of, if there were any.

[16] The non-compliance with rule 18(4) of the Uniform Rules of Court may only be a disobedience of a Rule of Court – but may not mean that the pleading is vague and embarrassing or lacking an averment necessary to sustain a course of action.¹⁰ The excipient must show that on any construction of the pleadings the claim is excipiable and the pleadings must be read as a whole and no paragraph may be read in isolation. When dealing with an exception, the court is enjoined to look to the pleading excepted to as it stands, and not to facts stated outside the pleading.¹¹ In the circumstances, consideration by the court a quo of the reversionary rights which the appellant may have had in the event of its claim being unsuccessful, was inappropriate.

[17] The appellant and the third, fifth, eleventh, twelfth and thirteenth respondents have presented this court with a consent draft order in terms of which they pray for the setting aside of the paragraphs (b), (c) and (d) of the order of the court below of 5 September 2018; that the five respondents be granted leave to withdraw their exception; to amend paragraph 89.1 of the appellant's amended particulars of claim by the addition of the words 'and the Plaintiff has been impoverished in the sum of R172 630 543.30'; after the word 'unjustified'; directing the appellant to pay the costs incurred by the third, fifth, eleventh, twelfth and thirteenth respondents for the taking of the exception up to and including the date of hearing, being 27 August 2018, and that the

⁹ See *R M Van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) at 256H – 257D.

¹⁰ See *ABSA Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, Third Party)* 1997 (2) SA 415 (W) at 418F-H.

¹¹ *Baliso v First Rand Bank Ltd t/a Wesbank* [2016] ZACC 23; 2017 (1) SA 292 (CC) para 33.

balance of costs in relation to the exception between the appellant and the third, fifth, eleventh, twelfth and thirteenth respondents including the costs of the application and hearing for leave to appeal against the judgment and order of the court a quo and the costs incurred by the parties for the application for leave to appeal to the SCA, as well as the costs of the appeal be the costs in the cause of the action under case number 5864/2016.

[18] The aforementioned respondents did not oppose the appellant's application for leave to amend its particulars of claim. They were constrained to participate in the proceedings in the court below only for the purpose of securing the costs of their exception to the appellant's particulars of claim, and the draft consent order prayed by the appellant and such respondents is granted.

Costs

[19] Costs of an amendment are, as with all costs, within the discretion of the court and a court of appeal is loathed to interfere in a matter of this nature unless an incorrect principle has been applied.¹² The grant of an amendment is an indulgence to the party requiring it, which entails that such a party is generally liable for all the costs occasioned by or wasted as a result of the amendment.¹³ The general rule is that a party giving notice of amendment is liable for the costs thereby occasioned to any other party.¹⁴ It therefore follows that the appellant is liable for the costs of the application for amendment and of its hearing. The costs incurred thereafter up to the application for leave to appeal to the SCA should be costs in the cause of the action.

Order

[20] In the result the following order is made:

- (a) The appeal against paragraphs b, c, and d of the order of the learned Judge D Pillay is upheld;
- (b) Paragraphs b, c and d of the aforesaid order are set aside;

¹² *Fripp v Gibbon & Co* 1913 AD 354 at 363; *Cronje v Pelser* 1967 (2) 589 (A) at 593A.

¹³ *Hart v Broadacres Investments Ltd* 1978 (2) SA 47 (N) at 51D; *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 347C.

¹⁴ Rule 28(9) of the Uniform Rules of Court.

- (c) The second respondent is ordered to pay the costs of the opposed appeal;
- (d) The costs of the application for leave to appeal against the order of the court below and the costs of the application for leave to appeal to the Supreme Court of Appeal shall be costs in the appeal.
- (e) The appellant is ordered to pay the costs of its application for amendment;
- (f) With regard to the costs of the exception argued by the appellant and the second respondent, each party is to pay its own costs.
- (g) The draft consent order prayed by the appellant and the third, fifth, eleventh, twelfth and thirteenth respondents is granted.

MADONDO DJP

MOODLEY J

MOSSOP AJ

Date Reserved: 6th November 2020
 Date Delivered: 11 DECEMBER 2020

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