IN THE HIGH COURT OF SOUTH AFRICA
WESTERN HIGH COURT, CAPE TOWN

CASE NO.: 16894/2007

In the matter between

AFRICAN AQUI CULTURE (PTY) LTD	Plaintiff/Respondent

and

CORNELIS FRANK UYS	First Defendant/Applicant
DENNIS JACOBUS BISHOP	Second Defendant/Applicant
VICTOR JAMES WEBER	Third Defendant/Applicant
FARMPROPS 56 (PTY) LTD	Fourth Defendant/Applicant
MCEDISI MAC KWELETA	Fifth Defendant/Applicant

JUDGMENT DELIVERED ON 18 FEBRUARY 2010

SAMELA, AJ

[1] This is an application by Fourth and Fifth Defendants (hereinafter called the Applicants) for the amendment of its pleadings. The Applicants admitted in their Plea that the 20th October 2007 agreement for the purchase of shares by the Applicants from the First to Third Defendants, was binding and enforceable. The Applicants now seek to amend their Plea to withdraw the aforesaid admission, through the introduction of an agreement not pleaded by either the Plaintiff in its particulars of claim nor the Applicants in their Plea. The Applicants claimed that a valid, and binding and enforceable agreement is the one which was concluded on the 3rd August 2007. The Respondent opposes the application on the following grounds, that:

(a) the Fourth and Fifth Defendants have not met the requirements for the withdrawal of an admission in the Plea; and

(b) the proposed new paragraph will render the Plea excipiable.

Mr J Louw appeared for the Applicants; and

Mr M W Janisch appeared for the Respondent.

[2] The following are common cause between the parties:

(a) The Applicants, in their Plea, dated 3 March 2008, admitted the 20 October 2007 agreement and that it was binding and enforceable;

(b) The Applicants now seek to withdraw the aforesaid admission by amending their pleadings;

(c) They (Applicants) would like to introduce an agreement which was not pleaded by either the Plaintiff in its particulars of claim nor the Applicants in their Plea;

(d) The Applicants assert that the sale of shares agreement was concluded on the 3rd August 2007 and not 20th October 2007 and pointed to agreement signed by the parties dated 3 August 2007;

(e) The Applicants contend that the admission of the 20th October 2007 agreement was made erroneously by their legal representatives at the time (who have since dissolved the partnership practice).

(f) The Applicants disputed the existence of a binding contract between the Plaintiff and First to Third Defendants. Furthermore, also deny that Ms Kleyn (agent) had authority to represent them, denying that the document in question was a valid contract and also deny the exercise of the option;

(g) The Applicants gave notice of proposed amendment to the Plaintiff on the 27th January 2009;

(h) The Fifth Defendant passed away on 2 April 2009.

(i) The Plaintiff claims delivery of the shares based on agreement which was concluded on the 19th October 2007, as the Plaintiff exercised its option granted to it by First to Third Defendants which, on 20 October 2007 were sold and transferred to the Applicants who knew of the earlier sale between the Plaintiff and the sellers;

(j) The Plaintiff contends that the Fifth Defendant was not entitled to retain the shares under the second sale, as the Fifth Defendant was aware of an earlier sale agreement between the Plaintiff and First to Third Defendants. Consequently, the second sale must be cancelled and shares be delivered to the Plaintiff as per agreement;

(k) The Plaintiff contends that the Applicant's claim that the 20th October 2007 agreement was made erroneously is inconceivable. Consequently the proposed amendment would render the Applicant's Plea excipiable as it would not disclose a defence and a triable issue;

(l) The pleadings have closed and the matter has not been enrolled for trial.

[3] The court is called upon to determine, exercise and apply judicially its discretion, so that fairness and justice should be done to the parties, in the following, whether:

(i) Fourth and Fifth Defendants have fulfilled the requirements for the withdrawal of an admission in the Plea; and

(ii) the proposed paragraph 6 would render the Plea excipiable.

[4] Rule 28 provides that any party wishing to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, must give notice to all other parties to the proceedings of intention to amend, and furnish particulars of the amendment. Where there is an objection to the proposed amendment, the notice of objection must clearly and concisely state the grounds upon which the objection is based or founded. A party which is giving a notice of amendment in terms of the rules will be liable for the costs occasioned to any other party by the amendment, unless the court directs otherwise. The party seeking an amendment bears the onus of showing or convincing the court that the application is made bona fide and that there is no prejudice to the other party.

Rule 28(4) provides that:

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

The general practice by South African courts has been to allow amendments unless the application to amend is made *mala fide* or that prejudice will be done to the other party, see **Moolman v Estate Moolman** 1927 CPD 27 at 29, where the court had this to say:

> *"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 it is sought to amend was filed."*

It is trite law that if the amendment that is sought to be introduced will result in a plea becoming excipiable, the court will refuse the amendment.

[5] Mr Louw, on behalf of the Applicants, submitted that the correct date of sale of shares agreement between the Applicants and the First to Third Defendants was 3 August 2007 and not 20 October 2007 as previously pleaded by the Applicants. In support of his submissions, he pointed out to the 3 August 2007 agreement, dated 3 August 2007 which was signed by the parties. He argued that a confirmatory affidavit by Susan Kleyn, who confirmed that full payment of sale of shares transaction took place on the 16 October 2007 and also advised the Fifth Defendant that as the full purchase price was paid in full, there was nothing required from him any longer. He argued further that there were no supporting affidavits to the Plaintiff's allegation that the First to Third Defendants were in agreement with it that the agreement was concluded on the 20 October 2007.

[6] Mr Janisch, on behalf of the Plaintiff, submitted that the sale of shares to the Applicants on the 20 October 2007 by the First to Third Defendants was invalid, as the Plaintiff had already concluded an agreement on the 19 October 2007 for the sale of the same shares. He argued that at the time the Applicants concluded the agreement and transfer of the aforesaid shares,

they knew of the earlier agreement between the Plaintiff and the First to Third Defendants. Consequently, the shares must be delivered to the Plaintiff pursuant to its entitlement under the first sale. In support of his submissions, he pointed out that the notice of proposed amendment was made only by the Applicants (Fourth and fifth Defendants). He argued that the Applicants seek to withdraw the 20 October 2007 agreement, and now seek to plead the 3 August 2007 agreement. He argued that the proposed amendment would render the Applicants' plea excipiable, as it would not disclose a defence to the allegation that an option agreement was concluded and would not raise a triable issue. He pointed out that the proposed amendment introduced the 3 August 2007 agreement, the essence being that the Applicants' agreement was concluded before the Plaintiff's agreement. He pointed out that the proposed amendment, read with 3 August 2007 agreement failed on the 17 October 2007 for non-fulfilment of the conditions precedent (suspensive conditions), and therefore the August agreement must be regarded as having lapsed. He argued that even if the earlier agreement was valid, the First Defendant could not on that basis alone sought to impugn the latter agreement, because there was still a valid option to acquire goods, capable of being exercised and enforced against the seller, and a valid sale once the option was exercised.
I will not deal with other submissions as I am of the view that they are untenable.

[7] I am of the view that the Applicants have given a reasonable explanation for the withdrawal of the admission. The Applicants have set out clearly that after the summons were served on them, the Applicant consulted with Ms Kleyn (agent) and Mr Durandt (attorney), who drafted the 3 August 2007 agreement at Ms Kleyn's office. After consultation with Mr Wiehan (a partner in Durandt & Van Vuuren firm) who left a message on the Applicants' phone saying the Applicants should not worry since the Plea had been drafted and filed at court. The Applicants trusted Mr Wiehan though the Applicants did not receive the pleadings copy. Mr Wiehan telephoned the Applicants and informed them that their offices were closing and the Applicants requested Mr Wiehan to send the file to their new attorneys. During consultation with their

new attorneys in December 2008, the Applicants had provided their new attorneys with the 3 August 2007 agreement copy. They were advised that the (3 August 2007) agreement had not been referred to in the Plea filed by Durandt & Van Vuuren and that it was necessary to amend the Plea and set out their defence, particularly, to the effect that the Applicant had purchased the First to Third Defendants' shares and paid the full purchase price on the 19 October 2007. The Applicants' explanation that the aforesaid omission could have been caused by the negligence or error or oversight of their attorneys is reasonable.

[8] The next issue is to determine whether the application was made *mala fide* or such amendment would cause an injustice to the other side which cannot be compensated by costs. Mr Louw submitted that the pleadings has been closed in this matter, and no trial date has been set down. He argued that the Plaintiff would not be prejudiced if the amendment is granted by court as it has been sought at an early stage of the proceedings. He argued further that the Plaintiff would be able to investigate the allegations proposed in the amendment and respond accordingly. In the light of this explanation, I am satisfied that the application was not made *mala fide* and that such an amendment would not cause an injustice to Plaintiff.

[9] The next issue is whether the amendment will render the pleading excipiable. In **Cross v Ferreira** 1950 (3) SA 443 (C) at 449G-450C the court had this to say:

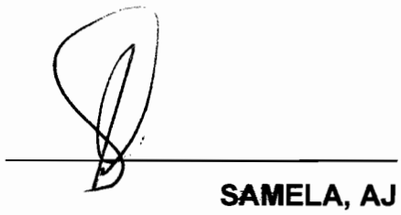
> *"... the weight of authority seems to favour the view that if the pleading as sought to be amended would be excipiable, this affords a ground upon which the court may, in the exercise of its discretion, refuse the application for the amendment."*

I am of the view that the proposed amendment is not vague and embarrassing nor is it lacking averments which are necessary to sustain an action or a defence. I am of the view that evidence can be led in the proposed amendment which can disclose a cause of action or a defence.

[10] In conclusion, having regard to the Applicants' explanation, I am satisfied that the application to amend was not made *mala fide*. Pleadings in this matter have already closed and there has been no trial date which has been set down. This strengthens my view that it was not necessary for the opposition to object to the amendment. There is no prejudice which will be caused by granting the amendment. The proposed amendment, in my view, will allow all the parties to properly, fairly and fully ventilate their disputes between them. I am of the view that denying the Applicants the amendment they seek will result in unfairness and injustice, particularly when all the circumstances placed before court have been taken into account.

[11] It follows therefore, that the Applicants are granted the amendment. I accordingly make the following order:

Amendment is granted, with costs.



SAMELA, AJ