IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: A23/2010

HENDRIK VAN NYKERK Appellant

v

GLONET THIRTEEN CC Respondent

JUDGMENT DELIVERED ON THIS 11TH DAY OF NOVEMBER 2010

FORTUIN, J:

[1] This appeal arises out of an action by Respondent (Plaintiff in the court *a quo*) against Appellant (Defendant in the court *a quo*) for payment of an amount of R100 000 being the balance of the purchase price allegedly owing in terms of a written sale of agreement (the agreement) for the sale of immovable property.

[2] The agreement contains a non-variation clause which stipulates that no modification, variation or alteration of the agreement shall be valid unless in writing and signed by both parties.

[3] At the hearing of the trial in the Magistrate's Court on 13 March 2008, Respondent raised an objection regarding certain questions posed in support

of Appellant's defence of a subsequent oral agreement reached between the parties.

[4] The objection was upheld by the court *a quo*, whereafter the matter was postponed to afford Appellant the opportunity to amend his plea.

[5] Appellant filed a notice in terms of Rule 55A of the Magistrate's Court Act 82 of 1944, which notice was withdrawn after Respondent filed an objection to the intended amendment.

[6] A further notice in terms of Rule 55A was filed by Appellant to which Respondent filed another objection. The objection was upheld and the application by Appellant to amend his plea was dismissed with costs. This is an appeal against that order.

THE AMENDMENTS APPLIED FOR IN THE COURT BELOW

[7] The amendments applied for were to the following effect:

7.1 That Appellant had discharged his obligation in terms of the written Deed of Sale by substituted performance, which Respondent had accepted.

7.2 That the action was excluded by reason of a *pactum de non petendo* concluded between the parties, i.e. an agreement not to sue or that the creditor will not enforce his claim, which agreement exists alongside the written Deed of Sale.

7.3 That Respondent was estoppped from enforcing the alleged obligation on which it had sued.

[8] In dismissing the application to amend the plea, the magistrate appears to have been persuaded that the defences which Appellant sought to introduce were dependant on the proof of an oral agreement which had the effect of varying the provisions of the deed of sale. The magistrate was quite correctly of the view that in principle it would not be permissible for a party to rely on such an agreement in the circumstances, not only because of the provisions of the non-variation clause, but also because of the effect of the formalities imposed in terms of the Alienation of Land Act 68 of 1981. The magistrate was misdirected, however, in equating an allegation of substituted performance with an amendment or variation of the agreement in terms of which stipulated performance was due. He was probably confused in this regard by the unnecessary allegation in the proposed amended pleading of an antecedent oral agreement in terms of which the allegedly substituted performance was defined.

[9] It is well established that substituted performance may be tendered and accepted without any violence to the terms of the contract in terms of which stipulated performance is due. See *Van der Walt v Minnaar* 1954 (3) SA 932 (O). The fact that the substituted performance is offered and accepted pursuant to a side arrangement is not really relevant. It is the fact of the performance that is material. If the seller accepts substituted performance of the purchaser's obligations under deed of sale, then the stipulated obligation

is thereupon discharged. This happens without any amendment being necessary to the deed of sale.

[10] The magistrate therefore erred in not recognising the defence of substituted performance as a triable defence, not inconsistent with either the non-variation clause or the formalities in terms of the Alienation of Land Act.

[11] When the proposed amendments are read as a whole, it is apparent that the alternative *pactum de non petendo* defence is in fact not an alternative defence, but merely a reformulation of the substituted performance defence. As a separate agreement it would in fact amount not so much to a *pactum de non petendo*, but a pleaded oral variation of the deed of sale. That would not be permissible and would give rise to an excipiable pleading. As mentioned it is the substituted performance of an obligation in the deed of sale that is the only triable issue. As mentioned, the fact that it may have occurred pursuant to an unenforceable orally determined arrangement is legally irrelevant. The magistrate was therefore correct in not allowing the so-called *pactum de non petendo* defence to be introduced by way of amendment.

[12] On analysis the estoppel defence is also nothing more than a disguised formulation of the substituted performance question, which, on the facts which Appellant wanted to plead, is the only triable issue that is raised. It is desirable that pleadings should clearly and succinctly define the issues to be tried. That object would not be served by allowing the pleading to be

amended to allow the inaccurate characterisation of a defence of substituted performance under an apparently separate heading of estoppel. I would therefore not be inclined to interfere with the magistrate's refusal to allow the so-called estoppel defence to be pleaded.

THE LAW WITH REGARD TO AMENDMENTS

[13] The law with regard to amendments was discussed very clearly by Thring, AJ (as he then was) in **Meyerson v Health Beverages (Pty) Ltd**[1], where he cites with approval the test by Watermeyer J in **Moolman v Estate Moolman & Another** 1927 CPD 27 at 29:

> " *... (T)he 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.*"

[14] A more recent discussion can be found in **Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)**[2] where it was stated that a proposed amendment to a pleading may be refused on the basis that it does not raise a triable issue. In this regard see the test with regard to what a triable issue as discussed by Blignault J in **Consol Ltd t/a Consol Glass v**

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[1] 1989 (4) SA 667 (C) at 675C.
[2] 2005 (6) SA 23 (C).

Twee Jongen Gezellen (Pty) Ltd (2).[3] The court has a discretion which should be exercised judicially in the light of all the facts before it.

[15] It has been established that the object of allowing an amendment is "to obtain a proper ventilation of the dispute between the parties".[4]

[16] As stated earlier, Appellant raised the following defences to the summons, i.e. substituted performance was tendered and accepted, in the alternative that there was an agreement not to enforce his claim and also in the alternative, that Plaintiff is estopped from alleging that Defendant has not performed.

[17] This court has to decide whether the above issues are indeed triable issues. I am of the view that the defence of substituted performance is a triable issue and that allowing the amendment would not cause an injustice to the Respondent that could not be cured by either a cost order or by a postponement.

[18] Rule 55 A(4) of the Magistrates Courts Rules of Court affords the courts a discretion to allow an amendment. Counsel for Appellant argued, correctly in my view, that, by refusing the amendment at this stage, the door to litigation will be closed to Appellant and he will be precluded from raising a triable defence.

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[3] Supra, para 21.
[4] JR **Janisch (Pty) Ltd v Wm Spilhaus & Co (WP) (Pty) Ltd** 1992 (1) SA 167 (C).

[19] I am therefore of the view that the Magistrate erred and misdirected himself in finding that all the amendments sought to the Plea did not raise triable issues and that the court *a quo* incorrectly dismissed the appellant's application in terms of Rule 55A(4).

[20] The appellant has achieved substantial success on appeal and is entitled to the costs of the appeal. He sought an indulgence from the court below and he was entitled only to partial success in his application to amend his plea. In the circumstances I consider that it would be appropriate if each party were to bear his/its own costs in the application for leave to amend before the magistrate.

[21] In the circumstances, I would make the following order:

1. The appeal is upheld with costs.
2. The order of the magistrate dismissing the application with costs is set aside and substituted by an order –
   (i) allowing the amendment of the plea in the manner proposed in paragraphs 1 and 2 of the Defendant's notice in terms of Rule 55A, dated 14 September 2008; and also by allowing the insertion of a paragraph 4.4. to the plea as proposed.
   (ii) refusing the application to amend the plea by the insertion therein of paragraphs 4.5 and 4.6, as proposed in terms of the aforementioned notice in terms of Rule 55A.

(iii) Directing that each party shall bear his/its own costs.

3. Respondent is ordered to pay Appellant's costs of appeal.

FORTUIN, J

I agree.

BINNS-WARD J