REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: 23787/10

In the matter between:

MANWOOD UNDERWRITERS (PTY) LTD	First Plaintiff
PERCIVAL COLIN MONTGOMERY	Second Plaintiff
TASMIN MONTGOMERY	Third Plaintiff

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED	Defendant

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JUDGMENT DELIVERED ON 5 DECEMBER 2012

DAVIS AJ:

Introduction

[1] This is an application brought by the plaintiffs for leave to amend their particulars of claim in terms of rule 28(4) of the Uniform Rules of Court ("the rules"), which relief is opposed by the defendant.

Background

[2] On 5 October 2006 the second and third plaintiffs ("the Mongomerys"), who were then resident in the United Kingdom, entered into a contract with the defendant ("Old Mutual"), through a branch of defendant styled "Old Mutual Guernsey" situate in Guernsey, Channel Islands, in terms whereof the Mongomerys invested an amount of £ 260 000,00 with Old Mutual ("the investment contract").

[3] The investment contract provided, in essence, that the Montgomerys would pay an amount of £ 260 000, 00 to Old Mutual which would be invested by Old Mutual, and that the Montgomerys would be entitled to withdraw the monies so invested upon notice given in accordance with the investment contract ("notice of encashment"), at which time the value of the funds invested, calculated in accordance with a pre-determined formula, would become due and payable to the Montgomerys. The investment contract stipulated certain requirements as to where, how and by whom notice of encashment had to be given to the defendant ("the notice requirements").

[4] On 26 October 2010 the plaintiffs instituted action against the defendant in which they claimed payment of an amount of R 4 342 233.89, being the rand equivalent of £ 275 288.39, which amount represented the value of the investment which was allegedly due to the Montgomerys in terms of the investment contract as at 14 February 2008 ("the encashment value").

The pleadings

[5] In their particulars of claim, as originally framed, the plaintiffs based their claim squarely on the investment contract, alleging that notice of encashment had been given by the Montgomerys' agent, that the defendant's refusal to pay the encashment value to the Montgomerys represented a breach of the investment contract, and that they were therefore entitled to damages in the sum of £ 275 288. 89, which was equivalent to the encashment value which they ought to have received. Although the claim is couched as one for damages, it seems to me that it is in reality a claim for payment, ie performance of the contract.

[6] On 15 December 2010 defendant delivered a plea on the merits in which it disputed that the Montgomerys had given a valid notice of encashment in terms of the investment contract, and accordingly denied that there was any amount due and payable to the Montgomerys in terms of the investment contract.

[7] On 21 February 2012 plaintiffs delivered a notice of intention to amend their particulars of claim by the introduction of an additional paragraph which is evidently aimed at meeting the defendant's contention that the notice of encashment did not comply with the notice requirements. Defendant objected in writing to the proposed amendment on 9 March 2012, prompting the plaintiffs to bring the present application for leave to amend.

[8] The notice of intention to amend seeks to augment the particulars of claim by the introduction of an additional paragraph 29.A which comprises five sub-paragraphs, each of which is further broken down into sub sub-paragraphs. As the notice of intention to amend runs to ten pages, it is too lengthy to quote in full. It suffices, for present purposes, to outline the structure of the proposed amendment:

(i) paragraph 29A. is an introductory paragraph which indicates that the averments in the ensuing sub-paragraphs are made in the alternative and in the event of its being found that the notice of encashment did not comply with the requirements of the investment contract;

(ii) paragraphs 29A.1 to 29A.3 contain factual allegations regarding representations allegedly made by the defendant, and reliance thereon by the Montgomerys and their agent, to the Montgomerys' detriment;

(iii) paragraph 29A.4 contains conclusions of law based on the facts set out in paragraphs 29A.1 to 29A.3, it being asserted that the defendant, in the circumstances, waived strict compliance with the notice requirements and is estopped from relying thereon;

(iv) paragraph 29A.5 contains a further alternative claim, which is also based on the facts set out in paragraphs 29A.1 to 29A.3. It is averred that the defendant breached a contractual obligation alternatively a general (delictual) duty which rested on it to ensure that correct information was furnished to the Montgomerys and their agent.

[9] The gist of the proposed amendment is to the effect that, if it is found that the notice of encashment was not compliant with the notice requirements prescribed in terms of the investment contract, then the plaintiffs aver that:

(i) during the period late 2006 to early 2008 Old Mutual made representations to the plaintiffs that the notice requirements were no longer applicable and need not be complied with for purposes of withdrawing an investment, and that the notice of encashment given on behalf of the Montgomerys was sufficient for purposes of withdrawing the investment ("the representations"); that the Montgomerys had relied

on the representations to their detriment by failing to ensure that the notice of encashment complied strictly with the notice requirements; and that in the circumstances Old Mutual had waived strict compliance with the terms of the investment contract, and was in any event estopped from relying on the notice requirements. Consequently defendants were barred as a matter of law from asserting that the notice of encashment was invalid (paragraphs 29A.1 to 29A.4);

(ii) in the alternative, plaintiffs aver that the representations made by Old Mutual were false and negligently made, and that Old Mutual thereby breached a contractual obligation owed to the Montgomerys to provide them with correct information, alternatively wrongfully breached a delictual duty owed to them to ensure that the correct information was provided to them, as a result of which breach the Montgomerys suffered damages in the amount claimed (paragraph 29A.5, read with paragraphs 29A.1 to 29A.3).

[10] For the sake of convenience I shall refer to that part of the amendment which pertains to waiver and estoppel as "the waiver and estoppel part" and to that part which deals with negligent misstatement as "the negligence part".

The objections raised by the defendant

[11] The defendant objects to the proposed amendment on the grounds that it is said to:

(i) introduce a new cause of action based on negligence which was not previously pleaded and which has prescribed ("the prescription point");

(ii) incorporate an alternative claim based on estoppel, which is a ground of defence and cannot be raised as a cause of action ("the estoppel point");

(iii) include an averment which lacks the particularity required by rule 18(4) of the rules ("the particularity point").

The impact of Guernsey law

[12] It is common cause on the pleadings that the investment contract is governed by the law of Guernsey. Given that Guernsey law is the proper law of the contract, it is necessary at the outset to consider what role, if any, the chosen foreign law has to play in the determination of this application.

[13] In *Society of Lloyds v Price; Society of Lloyds v Lee*[1] ("*Price*"), Van Heerden JA set out the relevant conflict of laws rule as follows: [2]

'According to principles of South African private international law, matters of procedure are governed by the domestic law of the country in which the relevant proceedings are instituted (the lex fori*). Matters of substance are, however, governed by the law which applies to the underlying transaction or occurrence (the proper law or* lex causae*).'*

[14] The characterisation of an issue as procedural or substantive has traditionally been done solely according to the law of the *lex fori*.[3] In *Price*, however, the Supreme Court of Appeal[4] endorsed the application of a *via media* approach to characterisation, which involves a consideration of both the rules of the *lex fori* and

[1] 2006 (5) SA 393 (SCA).

[2] Para [10].

[3] *Laurens NO v Von Hähne* 1993 (2) SA 104 (W) at 116 H; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 518 D.

[4] Para [12] – [14].

the *lex causae* pertaining to classification. What is advocated is the making of a provisional classification having regard to both systems of law, followed by a final characterisation which takes into account policy considerations and which enables the court *'to determine in a sensitive and flexible manner which legal system has the closest and most real connection with the dispute before it.'* [5]

[15] In the nature of things, the application of the *via media* approach requires that there be evidence before the court of the relevant foreign law rules. In this matter, however, there is no evidence before me regarding the content of Guernsey law as this is an interlocutory application without affidavits. No doubt evidence regarding the relevant foreign law principles will be led at a later stage in the proceedings. I do not consider that I am able to take judicial notice of the content of Guernsey law, as provided for in Section 1(1) of the Law of Evidence Amendment Act No. 45 of 1988,[6] as it is not capable of being ascertained readily and with sufficient certainty.[7] Nor would it be appropriate for me to do so *mero motu* and without hearing the parties in that regard. In these circumstances, therefore, I must necessarily classify the relevant issues solely in accordance with the *lex fori*.

[16] Clearly the ultimate question of whether or not the plaintiff ought to be given leave to amend its particulars of claim is a procedural matter. Likewise, the estoppel and particularity points concern the manner of pleading, which is a question of procedure. These objections must therefore be decided in accordance with South African law. The issue of prescription, however, requires closer scrutiny to determine whether the issue should be classified as a matter of procedure or substance, and therefore whether South African or Guernsey law applies in that regard.

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[5] Price *supra* n 1 at para [14].

[6] The relevant part of section 1(1) reads as follows, *'Any court may take judicial notice of the law of a foreign state ... in so far as such law can be ascertained readily and with sufficient certainty...'*.

[7] Textbooks and materials on Guernsey law are not readily available in South Africa. Guernsey is a self-governing British Crown Dependency. It is a distinct legal jurisdiction with its own parliament, courts and appellate structure. Guernsey common law represents a fusion of old Norman customary law, French and English law.

The prescription point

[17] The defendant argues that the claim sought to be introduced in terms of the misstatement amendment has prescribed since it is based on conduct which allegedly occurred during the period late 2007 until early 2008, and that the misstatement amendment ought therefore to be disallowed. The defendant apparently bases this contention on the three year prescription period contained in section 11(d) of the Prescription Act 68 of 1968 ("the Prescription Act").

[18] Much of counsels' argument was centred on the question whether or not the claim(s) sought to be introduced in paragraph 29A.5 of the proposed amendment related to the same debt as that claimed in the original particulars of claim. Mr Walters, who appeared for the plaintiff, contended that the claim(s) raised in the amendment involve the same debt as the one already pleaded, namely the Montgomery's claim to payment of the amount of £ 275 281.39. It seems to me that this argument overlooks the fact that a debt, or obligation, is the correlative of a right of action,[8] and that where a creditor has two rights of action, there are two corresponding debts.[9]

[19] The right of action sought to be enforced in the original particulars of claim is payment in terms of the investment contract. The rights of action involved in the amendment are claims for damages based on negligent breaches of a contractual duty, alternatively a delictual duty, to furnish correct information. To my mind the latter claims involve rights and obligations which are essentially different from those involved in the former, and the debts are therefore not the same.[10]

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[8] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15H.

[9] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842 F

[10] See *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 629 F - G

[20] Indeed the very fact that the claims sought to be introduced in the amendment are couched as alternatives to the main claim for payment seems to indicate that they involve different debts. As was pointed out by Eksteen AR in *Sentrachem v Prinsloo*:[11]

'Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesenlik dieselfde skuld probeer afdwing. Die skuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaoropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteengesit word ... So 'n wysiging sal uiteraard nie 'n ander vorderingsreg naas die oorspronklike kan inbring nie ...' (my emphasis)

[21] It seems to me, therefore, that the claims sought to be introduced in paragraph 29A.5 of the amendment have likely prescribed under South African law. As will become apparent, however, that is not a question I have to decide. On the view I take of the matter, the pertinent question is whether the issue of prescription falls to be determined in accordance with South African or Guernsey law.

[22] A distinction has traditionally been drawn in South African law between those prescription statutes which operate to extinguish rights, and those which merely bar a remedy by imposing a procedural limit on the institution of action to enforce the right. Statutes of the former kind are regarded as substantive in nature, while the latter are regarded as procedural.[12] Section 10(1) of the Prescription Act makes it clear that prescription under the Act operates to extinguish a right. This means that prescription in South African law is classified as a matter of substantive law and not procedure,[13] and as such is not a matter for the *lex fori*. Thus the Prescription Act does not apply in this case.

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[11] *Supra* n 8 at 15J – 16C

[12] *Price supra* n 1 at para [10] and authorities cited at footnote 6.

[13] *Price supra* n 1 at para [16]; *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* 1981 (3) SA 536 (W) at 538 D – F.

[23] One must therefore look to Guernsey law in order to ascertain whether prescription is regarded as substantive or procedural in Guernsey. If it is regarded in Guernsey as substantive, Guernsey law will apply to determine the issue of prescription. If, however, prescription is characterised as procedural in Guernsey, one will be faced with the conundrum of the 'gap' described by Booysen J in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd ("Laconian")*[14] where the *lex fori,* being substantive, does not apply, and the *lex causae,* being procedural, also does not apply. The court would in that event be required to make a policy based choice as to which legal system to apply to resolve the issue.[15] That, however, is a dilemma for another day – if it arises at all.

[24] I have already adverted to the absence of any evidence before me regarding the relevant content of Guernsey law. I am not in a position, therefore, to determine whether prescription in Guernsey is classified as a matter of procedure or substance and, if it is substantive, whether the claim contemplated in the negligence part of the amendment has prescribed under Guernsey law.

[25] Mr Oosthuizen, who appeared for the defendant, submitted that I need not decide whether South African or Guernsey law governs the question of prescription in this case. He argued that it is for the party relying on foreign law to plead it and prove it, and that it was therefore incumbent upon the plaintiffs to raise the applicable foreign law principles in an affidavit in support of the application for leave to amend. What it amounts to is that the plaintiffs should have anticipated the defence of prescription and provided proof that the claims had not prescribed under Guernsey law. I cannot accept this submission. It is well established in our law that it is for the party relying on prescription to allege and prove prescription.[16] There was therefore no onus resting on the plaintiffs to raise and deal with the issue of prescription in their application for leave to amend.

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[14] *Supra n* 3 at 524 B.

[15] This would be the third stage in the *via media* approach, referred in *Price* at para [26].

[16] *Gericke v Sack* 1978 (1) SA 821 (A)

[26] I am therefore faced with the situation where it is possible that Guernsey law governs the issue of prescription in this case, and that the claims sought to be introduced in terms of the negligence part of the amendment might be alive and enforceable under Guernsey law.[17] In these circumstances I consider that it would be wrong for me to close the doors of the court on the plaintiffs by disallowing the amendment. As Van Heerden JA pointed out in *Price* - [18]

'Considerations of international uniformity of decisions suggest that claims which are alive and enforceable in terms of the law of the country under which such claims arose should as a general rule also be enforceable in South Africa.'

[27] Furthermore, it seems to me that the cases show that the courts are slow to refuse leave to amend on the grounds of prescription, which should usually be raised by way of a special plea[19] thereby allowing for the possibility of a replication to the defence of prescription, and that it is only appropriate to disallow an amendment where the claim is *'known to have prescribed'*,[20] or, in other words, where it is beyond dispute that the claim has prescribed.[21]

[28] I therefore consider that the objection based on the prescription point must fail and the negligence part of the amendment allowed.

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[17] My research suggests to me that the period of prescription in Guernsey law for civil claims, other than personal injury claims, is six years.

[18] At para [28].

[19] *Rand Staple-Machine Leasing (Pty) Ltd v I.C.I. (SA) Ltd* 1977 (3) SA 199 (W) at 202 F; *Union & SWA Insurance Co Ltd v Hoosein* 1982 (2) SA 481 (W) at 482 G – H; *Cordier v Cordier* 1984 (4) SA 524 (C) at 535 G – I

[20] *Stroud v Steel Engineering Co Ltd and another* 1996 (4) SA 1139 (W) at 1142 D; *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C) at 354 J – 355 A.

[21] As was the case in *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Limited* 2004 (3) SA 160 (SCA), where summons had been issued in the name of the wrong creditor and had not interrupted prescription.

The estoppel point

[29] In the original particulars of claim plaintiffs alleged that notice of encashment had been given to the defendant. Defendant pleaded that the notice of encashment did not comply with the requirements of the investment contract. Plaintiffs seek to answer this allegation in the waiver and estoppel part of the amendment by pleading that, if it is found that the notice of encashment did not in fact comply with the requirements of the investment contract, it is then averred that the defendant waived its right to rely on the notice requirements by virtue of the circumstances pleaded in paragraphs 29A.1 to 29A.3 of the amendment, and is in any event estopped from doing so.

[30] In essence the plaintiffs wish in their particulars of claim both to plead a waiver of the notice requirements, and also an estoppel barring the defendant from relying on the notice requirements. The question is whether it is permissible so to do.

[31] Mr Walters contended that estoppel was not being used to found the plaintiffs' cause of action, but rather as a shield against the anticipated defence of non-compliance with the notice requirements of the investment contract. Mr Oosthuizen argued that this approach is unprecedented and contrary to established authority. He referred to the case of *Mann v Sydney Hunt Motors (Pty) Ltd*[22] in which Diemont J referred[23] to the well-known *dictum* of Sir Norman Birkett LJ in *Combe v Combe*[24] that *'...the plaintiff is using estoppel as a sword whereas it can only be used as a shield,'* and went on to hold that: [25]

'An estoppel pleaded by the plaintiff in his replication to meet allegations raised in the plea is not the same thing as an estoppel used in the declaration as an instrument of attack. In our law estoppel remains a weapon of defence.'

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[22] 1958 (2) SA 102 (GW).

[23] At 106 G – H.

[24] 1951 (2) KB 215 at p 224.

[25] At 107 D

[32] There are indeed many cases which state that estoppel cannot found a cause of action, and that it is a weapon of defence, not one of offence.[26] Rabie gives the following illustration of the application of this rule in the context of pleading:[27]

'This means, as far as the question of pleading is concerned, that a plaintiff cannot, in formulating a claim, allege – to take a simple illustration – that the defendant is estopped from denying that X was his or her agent for the purchase of certain goods from the plaintiff and that the defendant is therefore liable for the purchase price. What the plaintiff should do, it is said, is to make the positive allegation when setting out the claim that X was the defendant's duly authorised agent, and then, if that allegation is denied by the defendant, meet the denial in the replication by pleading that the defendant is estopped from denying X's authority. By pleading in such a way, it is said, estoppel is used as a weapon of defence and not as an instrument of attack.'

[34] It is worthy of note that the view that estoppel cannot found a cause of action has been much criticised.[28] Visser and Potgieter[29] consider that the law ought to recognise that estoppel has substantive legal consequences. A number of authors argue for recognition of the notion that ownership can be acquired through estoppel.[30] McLennan, in a review of Visser and Potgieter's work, writes that:[31]

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[26] See *Union Government v National Bank of SA Ltd* 1921 AD 121 at 128; *Pandor's Trustee v Beatley & Co* 1935 TPD 358 at 363 - 364, *Mann v Sydney Hunt Motors (Pty) Ltd supra* n 17 at 107; *Adriatic Insurance Co v O'Mant* 1964 (3) SA 292 (SR) at 295 C; *Rosen v Barclays National Bank Limited* 1984 (3) 974 (W) at 983 H – I; *De Klerk v Old Mutual Insurance Co Ltd* 1990 (3) SA 34 (E) at 41 B – J; *Sodo v Chairman ANC, Umtata Region* [1998] 1 All SA 45 (Tk) 51.

[27] P J Rabie (updated by H Daniels) 'Estoppel by Representation', 9 Lawsa (2 ed) para 672; see too LTC Harms *Amler's Precedents of Pleadings* (6ed) p 166 regarding the pleading of estoppel.

[28] See P J Visser and J M Potgieter *Estoppel: Cases and Materials* (1994); E Kahn *et al Contract and Mercantile Law: A Source Book* (1988) at p 308; M A Millner *'Totemic Law'* 1958 *SALJ* 240.

[29] *Supra* n 28 at p vii and p 35.

[30] See,*inter alia*, HJO Van Heerden *'Estoppel: 'n Wyse van Eiendomsverkryging?'* 1970 *THRHR* 19; J W Louw *'Estoppel en die Rei Vindicatio'* 1975 *THRHR* 218; S Van der Merwe and LF Van Huysteen *'A Perspective on the Elements of Estoppel by Representation'* 1988 *TSAR* 568; P J Visser *'Estoppel en die Verkryging van Eiendomsreg in Roerende Eiendom'* 1994 *THRHR* 633.

[31] J S McLennan 1995 *SALJ* 730 at p 731.

'This branch of the law remains bedevilled, as the authors point out, by a number of hoary myths. One of the worst – if not the *worst – is the notion that estoppel operates as a kind of fiction. Where, for instance, estoppel succeeds in a vindicatory action, the only logical conclusion is that ownership actually passes. The arguments advanced by the authors show convincingly that the alternative theory yields untenable and even ludicrous results. Such misconceptions are probably linked to the other anachronistic idea that estoppel is purely a defence and never a cause of action – a "shield, not a sword". I cannot for myself ever recall having heard one persuasive argument why this should be so. Indeed, in at least one branch of the law it effectively acts as a cause of action. This is the situation of ostensible authority of an agent. If the third party sets up the estoppel in his particulars of claim, he will be met with an exception. The trick, as we all know, is to allege actual authority, and when this is denied by the principal in his plea, to replicate estoppel. The problem is solved by procedural subterfuge. "Our law should accept a more advanced view of the concept of estoppel, namely as a remedy not merely giving limited recognition to a fiction, but as a way of turning a representation into actual fact as far as the law is concerned" (at 35). I agree entirely.' (Emphasis added.)*

[35] While the last word may not yet have been spoken on the question of whether or not estoppel is capable of founding a cause of action, it is not necessary for me to express a view in this regard. To my mind this case can and should be decided in the light of the well-established principles governing the amendment of pleadings.

[36] It is recognised that waiver and estoppel are frequently relied upon in the alternative in litigation involving insurance contracts.[32] In the present case the plaintiffs seek to rely in their particulars of claim on waiver and estoppel, based on the same pleaded facts. Certain conduct is alleged, on the basis of which it is concluded that the defendant both waived reliance on the notice requirements, *'and, in any event, is estopped from so doing'*. The waiver and the estoppel function as defences which negative the defendant's reliance on non-compliance with the notice requirements, and in this manner serve to establish the cause of action indirectly.

[32] M F B Reinecke *et al* 'Insurance', 12 Lawsa (First Reissue) para 460

[37] It is clear that there can be no objection to a plaintiff alleging in its particulars of claim that a condition or requirement in a contract, which would otherwise be destructive of any right of action based on the contract, has been waived by the defendant.[33] I can see no reason why, in such a situation, estoppel cannot be pleaded in the alternative to waiver – as was done in the plaintiff's declaration in *Norris v Legal & General Assurance Society Ltd.*[34] It seems to me that where the same conduct is alleged to found both a waiver and/or an estoppel, it would be highly artificial - or '*procedural subterfuge*' to use the words of McLennan - to insist that the plaintiff refrain from referring to estoppel in the particulars of claim and raise in in a replication instead.

[38] Even although the plaintiffs' pleading in the amendment may not be strictly correct in the light of the received wisdom that estoppel cannot found a cause of action, I am reminded by the familiar *dictum* of Innes CJ in *Robinson v Randfontein Estates Gold Mining Co Ltd* [35] that, *'pleadings are made for the Court and not the Court for pleadings.'*

[39] I am also mindful of the many cases in which it has been held that amendments ought to be allowed in order to determine the real issues between the parties so that justice may be done, and ought only to be refused where an amendment would cause prejudice to the other party not remediable by an order for costs.[36] I cannot think that the defendant would be prejudiced by the pleading of waiver and estoppel at once as alternatives in the particulars of claim, rather than holding over the estoppel to be raised in a replication. Indeed Mr Oosthuizen did not contend that any such prejudice would arise.

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[33] See *Adriatic Insurance Co v O'Mant supra* n 26 at 295 G - H

[34] 1962 (4) SA 743 (C) at 744 E - F

[35] 1925 AD 173 at 198

[36] See *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd and another* 1967 (3) SA 632 (D) and cases referred to therein;

[40] Furthermore, in *Cross v Ferreira,*[37] Van Winsen AJ (as he then was) recognised[38] a possible departure from the general rule that an amendment ought not to be allowed where it would render the pleading excipiable, in '*exceptional cases where the balance of convenience or some other such reason might render another course desirable.*' I consider this to be just such a case.

[41] Accordingly, in my view the objection based on the estoppel point must fail.

The particularity point

[42] In paragraph 29A.1 of the notice of intention to amend the plaintiffs allege as follows:

'During the period late 2007 and until early 2008, and thus both prior and subsequent to 29 February 2008, and at all material times, Old Mutual, represented, **inter alia**, *by Marc Bradshaw, represented, expressly and by conduct, ...' (my emphasis)*

[43] The defendant objects to the use of the words *inter alia* on the basis that they do not convey the identity of the persons alleged to have made the representations with sufficient particularity to enable the defendant to plead thereto, as required by rule 18(4).

[44] Mr Oosthuizen contended that the defendant needs to know the identity of the alleged representors to enable it to take instructions, to plead and to come to trial prepared to meet the case against it. Mr Walters countered that the defendant is not embarrassed and is able to plead to the amendment. He pointed out that the test, at this stage of the proceedings, is whether the amendment sought is so phrased that

[37] 1950 (3) SA 443 (C)

[38] At 450 E - F

the defendant can reasonably and fairly be required to plead thereto,[39] and that the defendant would later be entitled to request further particulars for purposes of trial, in terms of rule 21.

[45] I not agree that the defendant can reasonably and fairly be required to plead to the amendment as presently worded. To my mind, the amendment is vague in regard to the identity of the persons alleged to have made the representations, and the defendant could not be expected to respond thereto with anything other than a bald denial.

[46] It is not good practice for parties to content themselves with vague allegations and bald denials in pleadings, leaving it to the stage of trial preparation to cure these defects by means of requests for further particulars. Apart from the fact that this is contrary to the rules, it is desirable that parties be informed as soon as possible in the litigation of the case they have to meet in order to promote prospects for the early settlement of matters, rather than at the eleventh hour before trial when considerable expense has been incurred.

[47] I am therefore of the view that the objection based on the particularity point must be upheld. Mr Walters indicated that, if I were otherwise disposed to grant leave to amend, he would be loath to sacrifice the entire amendment by virtue only of the words *"inter alia"* in paragraph 29A.1, and he requested me, in that event, to grant leave to amend subject to the striking out of these words. In *Stuttaford & Co Ltd v Scher* [40] and *Heinze v Friedrich*[41] the Court grant leave to file amendments in an altered form, as defined in the judgment. I intend to follow a similar course by acceding to Mr Walter's request.

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[39] *Trope v South African Reserve Bank and another and two other cases* 1992 (3) SA 208 (T) at 210 G – H.

[40] 1931 CPD 341

[41] 1927 SWA 100

Costs

[50] It remains only to deal with the question of costs. In this regard, Mr Walters fairly and rightly conceded that if any of the defendant's objections were upheld, it would entitled to costs. I agree. Notwithstanding the fact that only one of defendant's objections was upheld, none of the objections advanced were frivolous or unreasonable. Defendant was entitled to oppose the indulgence sought by the plaintiffs and its costs of opposition should therefore be borne by the plaintiffs.

Conclusion

[51] In the result I make the following order:

1. The applicants are granted leave to amend their particulars of claim in accordance with their notice of intention to amend dated 21 February 2012, subject to the proviso that the words "***,inter alia,***" which appear in paragraph 29A.1 of the said notice, shall be deleted.

2. The applicants are ordered to pay the respondent's costs of opposition on the scale as between party and party.

D M DAVIS
Acting Judge of the High Court