Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 19183/2007

In the matter between:

UWE PAPESCH **Applicant**

and

AXEL BERNHARD SPANHOLTZ **Respondent**

JUDGMENT DATED: 31 OCTOBER 2017

LE GRANGE, J:

Introduction:

[1] This is an application brought by the Applicant ("Defendant in the main action") for leave to amend its Claim in Reconvention in terms of Rule 28(4) of the Uniform Rules of Court, which relief is opposed by the Respondent ("Plaintiff in the main action"). I will refer as a matter of convenience to the Applicant as the Defendant and the Respondent as a Plaintiff.

BACKGROUND:

[2] The salient facts underpinning the application in brief are the following. The Plaintiff instituted action against the Defendant for payment of the balance of the purchase price, that was payable by the Defendant to the Plaintiff in respect of the shares held by Plaintiff in a company known as Fraai Uitzicht 1798 Farm Pty Ltd ("Fraai Uitzicht") and his right, title and interest to his loan account against the company. The sale transaction was pursuant to a written Sale Agreement, with Annexures ("the Agreement") concluded between the parties on 11 October 2005.

[3] It appears to be common cause that the Defendant did not pay the full purchase price. The balance in the amount of R1 550 000.00 which was payable on 31 October 2007, together with interest thereon, is still outstanding.

[4] The Defendant, on 2 July 2008, filed a Plea in which the indebtedness to the Plaintiff as claimed was admitted. The Defendant, however, pleaded that he was exempted from the payment of those amounts on the basis that the Plaintiff was indebted to him in greater amounts. These amounts were set out in the Claim in Reconvention.

The Pleadings:

[5] The Claim in Reconvention was filed, at the same time on 2 July 2008, by the Defendant which it now seeks to amend. The pleading in its unamended form records the following *inter alia*:

> `*1.1 The Defendant relies upon the same written Sale Agreement dated 11 October 2005 ("the Agreement") in respect of the sale of the shares and loan account;*
>
> *1.2 The Defendant alleges that the material terms and conditions of the Agreement included certain warranties;*
>
> *1.3 The Defendant alleges that the Plaintiff breached the aforesaid terms and conditions in various respects, including that there were defects in the immovable property and incorrect recordals in respect of the movable property, more particularly:*
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> *1.3.1 That the vineyards were infected with a disease known "leaf roll", which would require the infected areas to be removed and replanted;*
>
> *1.3.2 That the peaches and apricot orchards were of poor plant quality, as a consequence of which substantial sections of the orchards had to be replanted;*
>
> *1.3.3 The Plaintiff misrepresented the extent of the olives that had been planted;*
>
> *1.3.4 The dam on the farm leaked and had to be repaired;*

1.3.5 There were a number of structural defects in the main house, the restaurant and a number of the guest cottages, causing water leaks and damp problems;

1.3.6 The value of the bottled and bulk wine was artificially inflated in the Financial Statements;

1.4 The Defendant pleaded that, when the Agreement was entered into, the aforesaid defects existed; the Plaintiff was aware or must have been aware thereof; but intentionally did not disclose same to the Plaintiff.

1.5 In respect of all the damages claimed, it is simply alleged that, by reason of the various breaches of the contract, and the defects in the assets of the company (whether immovable or movable) the Defendant suffered damages in the amounts claimed. The Defendant further pleaded that the Plaintiff was indebted to him for damages in the amount of R4 447 548.40, less the amount of R1 530 000.00, being the amount admitted to be owing by the Defendant to the Plaintiff in respect of the balance of the purchase price.'

[6] The Plaintiff in turn denied the alleged breaches of contract, and denied any liability to the Defendant.

The Proposed Claims:

[7] The claims now sought to be introduced were styled as Claim "6A" and Claim "6B" in the Notice of Intention to Amend. In the proposed Claim "6A", the Defendant alleges that:

'1.6 In the Schedule of Warranties, forming part of the Agreement, the Plaintiff had warranted that (save as disclosed in the Agreement), "*none of the assets of the company are subject to any mortgage bond, notarial bond or debenture, any right of retention pledge, lien, cession in security or other encumbrance, option, pre-emptive right, right of first refusal, lease instalment sale or credit agreement*."

1.7 That the Plaintiff breached that term, in that he failed to inform the Defendant of the existence of an "*unregistered right of way in favour of certain neighbours over the company's property, in respect of which the Western Cape High Court under Case No. 19182/2011, ordered the registration of a servitude right of way on 2 November 2011. The servitude being registered against the property during 2014*";

1.8 That the "*registration of the servitude*" was causing financial loss to the Defendant in that *inter alia "the Defendant is prevented from expanding the guesthouse business, so as to accommodate more guests due to the proximity of the servitude to the guesthouse"*;

1.9 The financial loss claimed by the Defendant, in the form of damages, was claimed in the amount of R3 650 000.00.'

[8] In the proposed Claim "6B", the Defendant alleges that:

'1.10 Prior to the conclusion of the Sale Agreement, the Plaintiff had sent documents to him stating that there was sufficient water on the property to *"irrigate 40 hectares of land";*

1.11 That the Plaintiff knew that the Defendant would act on the assumption that the documentation was factually correct and owed a duty of care towards the Defendant to provide correct information;

1.12 The documentation was material and made with the intention of inducing the Defendant to act thereon;

1.13 The Defendant, relying upon the truth thereof, entered into the Sale Agreement with the Plaintiff without being notified that the representation was false and without it being brought to the Defendant's attention that the amount of water reflected in Annexure "B" to the Schedule of Warranties (forming Annexure "A" to Annexure "UP1") specifies that the number of hectares of water rights are 25.2 hectares of water rights, and did not reflect that it was sufficient for 40 hectares;

1.14 That the Plaintiff was negligent in making the representations, alternatively negligent in failing to draw the Defendant's attention to the altered Annexure "UP1";

1.15 As a consequence of the Plaintiff's representation, the Defendant had suffered damages in the amount of R1 250 000.00 which was the amount it would cost to irrigate *"an additional 25 hectares of farm land".'*

The Strike-out:

[9] The Defendant filed a notice to strike out a number of paragraphs in the Plaintiff's answering affidavit on the grounds that these paragraphs are either irrelevant, scandalous, vexatious or argumentative. According to the Defendant, the insertion of the alleged offending paragraphs does not pertain to the disputes in issue and is irrelevant to the determination thereof.

[10] In terms of Rule 6(15) of the Uniform Rules, a Court may on application strike out from any affidavit any matter which is scandalous, vexatious or irrelevant if it is satisfied that the applicant will be prejudiced in his case.

[11] On a conspectus of all the papers filed of record, the paragraphs complaint of by the Defendant, mostly relate to the circumstances and background underpinning the proposed amendments. These factors, in my view, can hardly be prejudicial to the Defendant's case. In my view they are

certainly relevant in determining whether the Defendant should be allowed to introduce the two proposed claims. It follows that the application to strike out falls to be dismissed.

The proposed amendments and objections raised by the Plaintiff:

[12] Turning to the proposed amendments and objections thereto. It is now well accepted in our law that the general approach to be adopted in applications of this nature, is to allow an amendment unless the application to amend is *mala fide* or the amendment would cause an injustice to the other side which cannot be compensated by costs, or unless the parties cannot be put back in the same position as they were when the pleading, which is sought to be amended was filed.[1] The power of the court to allow material amendments is, accordingly, limited only by consideration of prejudice or injustice to the other side.[2]

The objections to the proposed amendments:

[13] The Plaintiff raised, in all, thirteen objections to the proposed amendments. As a result of the view I have taken in this matter, it is unnecessary to deal with each of the objections. There are essentially three main grounds against the proposed amendments. The first is that the proposed amendments attempt to introduce a new cause of action. Secondly, the proposed new cause of action has prescribed and thirdly, that the

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1 See DE Van Loggerenburg *Erasmus: Superior Court Practice* (2nd ed 2015) Vol 2 [Service 4, 2017] at D-331 to 342 and the cases referred therein.
2 *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127D-G.

proposed amendments would render the Defendant's pleadings excipiable.

[14] The Plaintiff, in respect of the proposed Claim "6A", *inter alia*, contended that the new proposed claim has prescribed by reason of the provisions of s 12(1), alternatively 12(3) of the Prescription Act, 68 of 1969. The Plaintiff in raising the issue of prescription accepted the onus to establish the date upon which prescription would have commenced and the date of completion.

[15] According to the Plaintiff, the original Claim in Reconvention in this matter was filed on 2 July 2008. The Order of Court that the Defendant relies upon in support of its proposed amendment was granted by agreement between the parties on 2 November 2011 under case No. 19182/2011. In terms of that Order, Fraai Uitzicht was the First Respondent. The Court *inter alia* ordered that the Applicants in that matter (or their duly authorised representatives), be granted access to and the right to use the road in question ("the right of way").

[16] According to the Plaintiff on these stated facts on the pleadings, the Defendant must have been aware by no later than 2 November 2011 of the existence of the unregistered right of way by reason of the fact that Fraai Uitzicht was a party to that proceedings and that the Order of Court, recognising the right of way, was taken by agreement.

[17] According to the Plaintiff upon a proper consideration of the pleadings, the proposed Claim "6A" has indeed prescribed, as the Notice of Intention to Amend the Claim in Reconvention was introduced on 31 August 2016, almost five years after the Order of Court was granted on 2 November 2011.

[18] The Defendant in essence did not take serious issue with the contention that the proposed amendments may introduce a new cause of action and or claim. The Defendant however is adamant that the proposed amendments are *bona fide* and necessary and if allowed, will determine the real issues between the parties which will have the effect of bringing the same parties before the same court on the same issues.

[19] The Defendant further contended that it suffered damages as a result of the registration of the servitude which only occurred in 2014 and that a right to a servitude is ineffectual in burdening land unless it is duly registered in the Registry of Deeds and endorsed upon the title deeds. To this end, it was argued that the issue of prescription should have been raised by way of a special plea rather than exception. Moreover, the issue as to when the Defendant first became aware of the Order of Court dated 2 November 2011 or the registration of the servitude is a matter of evidence.

[20] Our case law is replete with instances where the Courts are slow to refuse leave to amend on the grounds of prescription, which ordinarily should be raised by way of special plea.[3]

[21] It is apparent that the Defendant in the proposed Claim "6A" relies upon a breach of contract, in the form of a breach of warranty, and that the proposed Claim "6B" is premised upon a negligent misrepresentation and accordingly is a claim in delict.

[22] There can be no doubt that the proposed Claim "6A", the Defendant now seeks to introduce, is a new cause of action. Although, in principle there can be no real objection to a new cause of action or defence being added by way of amendment, such amendment can only be objectionable in circumstances where for instance the cause of action was not in existence at the time of issuing the summons.[4]

[23] In the present instance, the question now is whether the proposed Claim "6A" is objectionable to the extent that it has prescribed by reason of the provisions of s 12(1), alternatively 12(3) of the Prescription Act, which provides as follows:

> "*12. <u>When prescription begins to run</u>: -*

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[3] *Manwood Underwriters (Pty) Ltd and others v Old Mutual Life Assurance Company (South Africa) Limited* [2013] 1 All SA 701 (WCC) para [27] and the cases referred to therein.
[4] *Erasmus* n 1 at D-335.

(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

[24] On the pleadings, it is common cause that on 1 April 2005, the Defendant acquired all the shares in Fraai Uitzicht from the Plaintiff and the shares were transferred to the Defendant who had been the Director and sole shareholder of the company at all material times. Moreover, in 2011 Fraai Uitzicht was a party to court proceedings whereby agreement between the parties recognised the right of way as envisage in the Order of Court. On these stated facts on the pleadings, the contention by the Plaintiff that the Defendant must have been aware by no later than 2 November 2011 or reasonably ought to have been aware of the existence of the unregistered right of way, cannot be regarded as contrived and must be accepted as established facts beyond a doubt.

[25] The contention by the Defendant that the right of way in this instance only came into being in 2014 when it was duly registered in the Registry of

Deeds and not upon the Order of Court in 2011, is clearly at variance with the pleaded facts and our current law.

[26] The Supreme Court of Appeal in Aventura Ltd v Jackson N.O. & Others[5], held that: 'While a way of necessity, ordinarily, comes into being upon the order of a court to that effect, it is usually desirable for this to be followed by the registration of a servitude to ensure that third parties have notice of the right of way…'.

[27] In the present instance, the said Order of Court in 2011 made it clear that the Applicants therein were entitled to a right of way, over the property owned by Fraai Uitzicht. Furthermore, the Applicants were granted immediate access to a precisely defined road and bridge that was depicted on a map.

[28] On these stated facts, the right of way was granted immediately and not on some convenient date in the future or when the servitude would be registered. As mentioned previously, the Defendant is the sole shareholder and Director of Fraai Uitzicht, and it is inconceivable that he was unaware of the Court Order granted on 2 November 2011. The claim by the Defendant that his knowledge or otherwise of the Court Order on 2 November 2011, is a matter of evidence and in the face of the established facts on paper, untenable and falls to be rejected.

[5] 2007 (5) SA 497 (SCA) para [9].

[29] In my view, this is one of those matters where on the pleadings, the issue of prescription is beyond dispute. The Plaintiff has clearly shown the date of commencement and completion of prescription, and that this claim has prescribed prior to the introduction of the Notice of Intention to Amend.

[30] It follows that the first objection by the Plaintiff must be upheld. The remaining objections raised by the Plaintiff in respect of this claim, although not unmeritorious, do not warrant further consideration as the introduction of Claim "6A" falls to be refused.

Objection(s) in respect of the proposed Claim "6B":

[31] The proposed amendment introducing Claim "6B" relies upon an alleged negligent statement by the Plaintiff, made prior to the conclusion of the Agreement, to the effect that there was "*sufficient water*" available on the property to irrigate 40 hectares of land, whereas the Agreement signed by the parties specifies that the number of hectares of "*water rights*" is 25.2 hectares and *"does not reflect that it is sufficient for 40 hectares".*

[32] The claim by the Defendant is that the Plaintiff was negligent in making such representation, alternatively negligent in failing to draw the Defendant's attention to the "*altered*" term of the contract, and that the Defendant is entitled to damages suffered as a consequence thereof.

[33] The Plaintiff, as mentioned previously, has also raised a number of objections against this proposed amendment on the basis that the claim has been pleaded in a vague and unclear manner and that the Plaintiff is uncertain as to precisely what the cause of action really is, and what the case is that it is required to meet.

[34] The primary objection by the Plaintiff against this proposed amendment was also that the Defendant was attempting to introduce a new cause of action which by reason of the provisions of s 12(1), alternatively s 12(3) of the Prescription Act, had in fact prescribed. According to the Plaintiff, the Defendant must have been or ought to have been aware of the existence of his alleged claim and or cause of action as the Director of Fraai Uitzicht on a date no later than 29 August 2013, which is a date more than three years prior to the filing of the proposed amendment. The Plaintiff had also, amongst others, objected to the fact that the Defendant failed to plead a valid cause of action as it failed to plead how Fraai Uitzicht would be entitled to irrigate an additional 25 hectares of farm land, in the absence of additional water rights being allocated in terms of the National Water Act, 36 of 1988.

[35] According to the Defendant, the date upon which it became aware that there was insufficient water on the property to water 40 hectares, is a matter for evidence and cannot be decided on at this point in time. Furthermore, the amendment does not raise a new cause of action but merely alleges further acts of negligence upon which the Defendant intends to rely. Similarly, the

Defendant contended that the objection that it failed to plead any entitlement, or ability in law to irrigate a greater area than the water rights already granted and that its claim for damages does not disclose a valid cause of action, alternatively that it would render the pleading vague and embarrassing, is a matter for evidence.

[36] It is trite that water rights are governed by the National Water Act. Furthermore, that water rights represent the volume of water that a land owner may lawfully use, if available, to irrigate his farm land. On the pleadings, it is evident that the number of hectares of farm land that had water rights and could lawfully be irrigated by Fraai Uitzicht was limited to 25.2 hectares. The Defendant, at all material times must have known or ought to have been aware of the hectare water rights as this was always known to both parties. It was properly recorded and described in the Agreement which was signed by all parties including the Defendant. Accordingly, the extent of the water rights, and the amount of water that might be utilised for irrigation lawfully, was known for a period of more than three years prior to the introduction of the amendment. On these pleaded facts the Defendant must have been aware or ought to have been aware on a date no later than 29 August 2013, which is a date more than three years prior to the filing of the proposed Notice of Amendment, whether such water that was available would be sufficient for 40 hectares and the alleged cause of action against the Plaintiff.

[37] The suggestion by the Defendant that the claim in respect of the water is not a new cause of action as it does not raise a new cause of action, but "*merely alleges further acts of negligence*" upon which the Defendant intends to rely, is unconvincing. The alleged breach relied upon by the Defendant is clearly a separate breach, and a separate and new cause of action, with separate facts, and separate damages. Moreover, the existing claims for damages against the Plaintiff are all premised on a breach of warranty, whereas the current proposed claim is premised upon a negligent misrepresentation and accordingly a claim in delict and not upon a breach of a contract. Furthermore, the suggestion by the Defendant that it relies on a further act of negligence by the Plaintiff for the proposed amendment is also unconvincing, as the Defendant in the existing Claim in Reconvention does not rely upon any claim based upon an "*act of negligence*".

[38] On these stated facts it is evident from the terms of the Agreement, that the Defendant was at all times, since 2005, aware or reasonably ought to have been aware of the number of hectares of water rights attached to the land of Fraai Uitzicht. Moreover, there is no allegation in the Defendant's pleading that there was, as a matter of fact, insufficient water on the property to irrigate 40 hectares of farm land and or whether there was indeed a shortfall and or how much water was in fact available. On these pleaded facts, the proposed amendment does not only render the pleading vague and embarrassing but any claim based upon a shortfall of water rights has indeed

prescribed, as envisaged in s 12(1), alternatively s 12(3) of the Prescription Act, and that the amendment falls to be dismissed.

[39] One of the Plaintiff's other objections that the Defendant failed to plead how Fraai Uitzicht would be entitled to irrigate an "*additional 25 hectares*" of farm land, in the absence of additional water rights being allocated or granted in terms of the National Water Act, is also not without merit. The Defendant has not pleaded any entitlement to irrigate more farm land than allowed by the 25.2 hectares of water rights held.

[40] The Defendant's claim for damages, representing the alleged "*cost to irrigate an additional 25 hectares of farm land*", in the absence of additional water rights being obtained or granted in terms of the National Water Act is highly questionable and the objection by the Plaintiff that on the pleaded facts the claim does not constitute a valid cause of action in law, is therefore not unfounded.

[41] Lastly, the objection by the Plaintiff that the entire counterclaim sought to be introduced by the Defendant cannot be a valid cause of action as the entire amount the proposed amendments intends to recover not only exceeds the entire purchase price but also includes further compensation whilst the Defendant retains the property, is also not without merit.

[42] The entire counterclaim, is all based upon alleged shortcomings to the property and the assets of the company, and amounts to R9 347 548.40. The purchase consideration for the shares and loan account as stipulated in the Agreement and annexures thereto was only in the amount of R9 030 000.00.

[43] The Defendant by way of these proposed amendments seeks to recover an amount that is in excess of the entire purchase price paid by him, thus effectively having the Plaintiff transfer the shares and loan account to him at no consideration.

[44] The Defendant's response that this is a matter for legal argument is unconvincing. It is difficult to imagine a valid cause of action, either in contract or in delict, which has the effect that, because of alleged defects in the merx, the seller is obliged not only to reimburse the entire purchase price of the merx to the purchaser, but also provide further compensation to the purchaser, whilst at the same time the purchaser retains the merx.

[45] For these reasons, it follows that the Plaintiff's objection(s) against the proposed amendments are successful and should be upheld.

[46] In the result the following order is made.

The Applicant's Application for Leave to amend its Claim in Reconvention is dismissed with costs.

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LE GRANGE, J