**Republic of South Africa**

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

Case number: 22189/2016

Before: The Hon. Mr Justice Binns-Ward

Hearing: 28 October 2021
Judgment: 29 October 2021

In the matter between:

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| **WHOLESALE HOUSING SUPPLIES (PTY) LTD** | Applicant/Plaintiff |

and

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| **RICH REWARDS TRADING 556 (PTY) LTD** | First Respondent/Defendant |
| **ABDUL SATHAR EBRAHIM MOHAMMED** | Second Respondent/Defendant |
| **LUIGI LUCA MARIA GIURICICH** | Third Respondent/Defendant |
| **WILHELM IMPORT NETWORK (PTY) LTD** | Fourth Respondent/Defendant |

*Order: 1. The application for leave to amend the particulars of claim is granted.*
*2. There is no order as to costs.*

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**JUDGMENT**
**Delivered by email and release to SAFLII**

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**BINNS-WARD J:**

[1] The matter up for decision is an application by the plaintiff to amend its particulars of claim. The application is opposed by the first, second and third defendants.

[2] In relevant part, the plaintiff has sued in the action for payment of the balance of the purchase price allegedly owed to it by the first defendant in respect of the sale to it by the

plaintiff of certain shares in and loan claims against the fourth defendant. It is not necessary for present purposes to describe the other claims advanced in the combined summons.

[3] The contract of sale provided for the payment of the purchase price in instalments. It further provided (in clause 13.1) that in the event of the purchaser defaulting on its obligations and remaining in default notwithstanding seven days' written notice to cure its breach, the full amount then still outstanding would thereupon become immediately due and payable. The plaintiff relies on the acceleration clause for its claim in the action for payment of the full outstanding balance of the purchase price.

[4] Paragraph 9 of the particulars of claim (which were not drafted by counsel) sets forth the particulars in which the first defendant is alleged to have breached the sale agreement. Paragraph 10 of the pleading as currently formulated then proceeds as follows:

> *On 27 July 2016 the First Defendant was given written notice to rectify the said breaches within 7 days as appears from ANNEXURE "POC2" hereto.*

The attachment annexed to the pleading as annexure POC2 is a copy of a letter dated 26 July 2016 from the plaintiff's attorneys of record to the first defendant. It is not a notice to rectify the alleged contractual breaches. Instead, amongst other matters, it lists the breaches and states (in para 6 thereof):

> *On 15 June 2016 you were notified of* [the] *breach and provided 7 days to rectify. You failed to do so. You are therefore liable for the full outstanding balance of the purchase price in the amount of R8 485 000 (eight million four hundred and eighty-five thousand rand) in term so* (sic) *clause 13.1 of the agreement, together with interest at the rate of 9% per annum from 30 November 2015 being the date you fell into arrears.*

[5] It is clear from paragraph 10 read with the annexure what the problem with the allegation is. The annexure is obviously the wrong document. It is plain from the content of the attached letter dated 26 July 2016 that it was addressed pursuant to the first defendant's failure to remedy the alleged breaches. The content also suggests that the notice giving the first defendant seven days to remedy its default was given on 15 June 2016, not 27 July as alleged in the body of the pleading.

[6] The plaintiff wants to amend the self-evidently defective paragraph 10 of its particulars of claim to read as follows:

*10.*

*10.1 On 15 June 2016 the First Defendant was given written notice to rectify the said breaches within seven days, as appears from Annexure "POC2(a)" hereto*

*10.2 On 27 July 2016 First Defendant was given further written notice that he had failed to rectify the said breaches within seven days, as appears from Annexure "POC2" hereto.*[1]

[7] The first to third defendants object to the proposed amendment. Their basis for doing so was set forth in their notice of objection in terms of Uniform Rule 28(3) as follows:

1. *The Plaintiff is introducing a new cause of action (right of action) that did not exist at the time when the Summons was issued.*
2. *The Plaintiff through its proposed amendment is seeking to introduce a cause of action for a claim which claim is known to be prescribed.*

[8] The basis for objection begs the questions what the plaintiff's pleaded cause of action is and whether the proposed amendment would introduce a different one.

[9] As mentioned, the relevant pleaded claim is for payment of the outstanding balance of a purchase price. The amount is claimed on an accelerated payment basis relying on the alleged breaches by the first defendant of the terms of the contract and the provision in the contract that makes the first defendant liable to pay the full balance then outstanding if, having been given seven days' written notice to do so , it failed to remedy the breaches. Accordingly, the facts that will have to be proved to establish the relevant pleaded claim (the so-called *facta probanda*) are (i) the existence of the contract, (ii) the alleged breaches thereof, (iii) the giving of the stipulated seven days' notice to cure them, (iv) the first defendant's failure to remedy the breaches within the grace period, and (v) the outstanding balance. They are pleaded in the particulars of claim as they currently stand in unamended form.

[10] If the amendment were allowed, the amended pleading would set out precisely the same *facta probanda* as those set out in the pleading in its current state. The pleading would

[1] The application for leave to amend and the preceding notice in terms of Rule 28 gave the date '*26 July*' in the contemplated amended para 10.2, but counsel stated at the hearing that was erroneous and should be '*27 July*'. The correction is inconsequential, and Mr *Güldenpfennig* SC for the defandants, reasonably, raised no objection.

still set out a claim for accelerated performance of the same contract on the basis of the same alleged breaches by the first defendant and its failure to remedy them after seven days' written notice. The elemental facts making out the cause of action would remain unaltered. The only changes would be that the pleaded allegations concerning the date on which the notice was given would be altered and a copy of the notice would be attached in place of the document previously annexed in self-evident error. The proposed changes go to the pleaded particularisation of the evidence needed to prove the *facta probanda;* i.e. the probative facts (*facta probantia*), which consist of the factual evidence to make out the *facta probanda*.

[11] Lord Esher MR famously distilled the difference between *facta probanda* and *facta probantia* in *Read v Brown* [1888] 22 QBD 128 at 131, when describing what made out a '*cause of action*'. The learned Master of the Rolls said that pleading a cause of action required the allegation of '*every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved*'. By '*every fact*', the learned judge meant the '*facta probanda*' and by '*every piece of evidence necessary to prove each fact*', he was speaking of the '*facta probantia*'. Lord Esher's analysis, adopted from the definition given by Brett J in *Cook v Gill* (L.R., 8 C.P. 107), has frequently been cited with approval in our jurisprudence: an early example is in *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23, where the reliance on it by this court in *Belfort v Morton* 1920 CPD 589 is mentioned. It is also still referred to in England as '*the classic definition*'; see *Doyle v PRA Group (UK) Ltd* [2019] EWCA Civ 12 (23 January 2019) at para 20.

[12] The effect of allowing the proposed amendment would not affect the elemental facts (*facta probanda*) necessary to be proved to establish the originally pleaded claim. Its effect would only be to alter the pleaded detail concerning the pieces of evidence (the *facta probantia*) that the plaintiff intends to adduce to establish those facts. The defendants' contention that the amendment that the plaintiff wishes to make will introduce a new cause of action is therefore misconceived.

[13] Mr *Güldenpfennig* SC's argument on behalf of the defendants that the summons in its current form does not make out a cause of action, and that, accordingly, any amendment that would rectify its defects would, of necessity, introduce 'a new cause of action' is not persuasive in my judgment. I have already explained that the *facta probanda* alleged in the existing summons do make out the cause of action, and that they remain unaltered by the

proposed amendment. It was not necessary in order to plead the cause of action for the plaintiff to attach a copy of its notice to the first defendant to cure the breach to its pleading. The fact that it nevertheless attached something that purported to be a copy of the notice but cognisably was not may have rendered the pleading vague and embarrassing, but it did not render the pleading excipiable for failing to make out a cause of action. Amending the pleading by removing the cause for it being vague and embarrassing would not alter the originally pleaded cause of action; it would merely render it more clearly pleaded.

[14] I am astute to the difference between a 'debt' (Afriks. *vorderingrsreg*) within the meaning of the Prescription Act 68 of 1969 and a 'cause of action' (Afriks. *skuldoorsaak*) as that term is understood in the rules of pleading, but it is quite clear in this case that the debt that is sought to be exacted in terms of the summons in its current state is identifiably the same as that which the plaintiff seeks to claim in terms of the proposed amended summons, and also that the grounds for, or nature of, the pleaded claim by which it is sought to do so will be unaltered if the amendment is allowed. Insofar as extinctive prescription informs the defendants' objection in the context of its contention that the originally pleaded claim does not disclose a cause of action, and assuming that my rejection of the contention were wrong, I think that Ms *Dicker* SC for the plaintiff was correct in arguing that the objection would in any event fall to be disposed of in the circumstances of the current case applying the reasoning of Eksteen JA in analogous circumstances in *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15I-16F.

[15] The plaintiff in *Sentrachem* had instituted proceedings in August 1993 by way of a combined summons in which he appeared to claim damages for breach of contract, alternatively in delict. Eksteen JA described the setting out of the grounds for the claim in the summons as having been '*by no means clear or satisfactory*'.[2] The plaintiff's legal representatives recognised the flaws in the originally drafted particulars of claim and amended the summons in July 1994 by deleting the particulars of claim completely and substituting them with an improved pleading setting out a main claim for breach of contract and three alternative claims, the first of which was predicated on the contract having been induced by the negligent or false representations of the defendant, the second, on the breach by the defendant of an alleged duty in law to ensure that the pesticide (AC 92-100) it had supplied to the plaintiff would not be deleterious to the plaintiff's system of biological pest

[2] The learned judge expressed himself as follows (at 16C): '*Die uiteensetting van die gronde waarop respondent se eis gebaseer was, was geensins duidelik of bevredigend nie*.'

control in its orchards and the third, the alleged negligence of the defendant's sales representatives, as agents of a dealer in specialist products, in representing that the product they sold to the plaintiff would have no negative effects on the plaintiff's system of biological pest control.

[16] The defendant in *Sentrachem* delivered a special plea of extinctive prescription, the relevant parts whereof were quoted in the Appellate Division's judgment as follows (at 16G-H; my translation from the Afrikaans):

> *'The causes of action upon which the plaintiff relies in its particulars of claim all prescribed by no later than February 1994'*
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> ...
>
> *'The plaintiff did not in his particulars of claim as they were before the above-mentioned amendments thereto were effected rely on any of the causes of action upon which he now relies in his amended particulars of claim'*

The issue was whether the defectively pleaded original particulars of claim had interrupted the running of prescription. The Appellate Division determined it as follows at 15H-16F:

> Die vorderingsreg en die skuld is ... slegs teenpole van 'n verbintenis, en waar die skuld verval, verval die vorderingsreg ook (*Erasmus v Grunow en 'n Ander* 1978 (4) SA 233 (O) op 245E en *Evins* [v Shield Insurance Co Ltd 1980 (2) SA 814 (A)] se saak supra op 842E-F).
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> Vir die doeleindes van die stuiting van verjaring is dit dus nie nodig dat die dagvaarding, waardeur die skuldeiser poog om betaling van sy skuld af te dwing, 'n skuldoorsaak hoef te openbaar nie. (T*rans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A); *Van Vuuren v Boshoff* 1964 (1) SA 395 (T); *Rooskrans v Minister van Polisie* 1973 (1) SA 273 (T).) Al is 'n dagvaarding vir eksepsie vatbaar omdat dit geen skuldoorsaak openbaar nie, kan dit nogtans dien om verjaring van die skuld wat geëis word te stuit. Die enigste voorbehoud is dat die dagvaarding nie so gebrekkig moet wees dat dit 'n nulliteit is in die sin dat dit nie vatbaar is vir wysiging om die gebreke aan te suiwer nie. Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesenlik diselfde skuld probeer afdwing. Die skuld of vorderingsreg moet minstens uit die oorsponklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteengesit word. (*Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) op 517B-C; *Maluleka* se saak supra op 279C; *Mokoena v SA Eagle Insurance Co Ltd* 1982 (1) SA 780 (O) en *Frol Holdings (Pty) Ltd v Sword Contractors CC* 1996 (3) SA 1016 (O).) So 'n wysiging sal uiteraard nie 'n ander vorderingsreg naas die oorspronklike kan inbring nie, of 'n vorderingsreg wat in die oorspronklike dagvaarding prematuur of voorbarig was, te red nie, of om 'n nuwe party tot die geding te voeg nie. (Vergelyk *Churchill* se saak supra; *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA

> 324 (T); *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) en *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T).)
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> In die onderhawige saak het die respondent deurgaans dieselfde skuld van die appellant gevorder, nl die skade wat hy gely het as gevolg van die gebruik van AC 92-100 in sy sitrusboorde. Hy het geen nuwe partye probeer voeg nie en sy eis was deurgaans opeisbaar. Die uiteensetting van die skuldoorsake waarin hy hierdie skuld regtens geklee het was moontlik gebrekkig of onduidelik en dit was hierdie tekortkominge wat die wysiging gepoog het om op te klaar. Die skuld soos dit tans in die gewysigde pleitstukke uiteengesit word en selfs die skuldoorsake waarop nou gesteun word, was myns insiens uit die oorspronklike besonderhede van eis kenbaar. Die appellant was dan ook deurgaans ten volle bewus gewees van respondent se bewerings en van al die wesenlike feite waarop die respondent sy beweerde skuld gevorder het. Daardie skuld het nie verander nie en is slegs deur die gewysigde pleitstukke duideliker ingeklee en uiteengesit. Die geleerde Regter a quo was dus reg om die spesiale pleit af te wys.[3]

[17] So even were the plaintiff's summons in its current state fundamentally defective for failing to competently set out a cause of action, or 'right to claim', as Mr *Güldenpfennig* put it (which is not my finding), that would not in the circumstances of the current case imply (i) that it would not be fairly susceptible to amendment to cure the defects or (ii) that the amendment would prejudicially affect the defendants' position with regard to extinctive prescription if such a defence were available to them on the facts.

[18] An order allowing the application for leave to amend the particulars of claim as prayed at the hearing will issue accordingly. The plaintiff asked that costs of the application

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[3] The right to claim and the debt are thus only opposite poles of a legal obligation, and where the debt lapses the right to claim also expires.
For the purpose of the interruption of prescription it is therefore not necessary that the summons by which the creditor seeks to enforce payment of the debt must disclose a cause of action. Even if a summons is susceptible to exception for not disclosing a cause of action, it can nevertheless serve to interrupt prescription of the debt which is being claimed. The only reservation is that the summons must not be so defective that it is a nullity in the sense that it is not amenable to amendment to cure the defects. The actual test is to ascertain whether the plaintiff is still seeking to enforce the same or essentially the same debt. The debt or right to claim must at least be identifiable from the original summons, so that a subsequent amendment would come down to the remediation of a defective or inchoate pleading in which the right to claim relied upon from the start is properly set out.
Such an amendment will in the nature of things not be able to introduce another right to claim or to rescue a right to claim prematurely advanced in the original summons or to join a new party to the action.
In the current matter the respondent has claimed the same debt from the respondent from the outset, namely the damage he suffered in consequence of the use of AC 92-100 in his citrus orchards. He has not attempted to join any new parties and his claim was enforceable throughout. The pleading of the causes of action by which he articulated this claim for legal purposes was possibly defective or unclear and it was those shortcomings which the amendment sought to remedy. The debt as it is now pleaded in the amended pleadings and even the causes of action now relied upon were in my view identifiable in the original particulars of claim. The appellant was also fully aware from the outset of the respondent's allegations and of all the material facts on which the respondent pursued his alleged claim. That claim has not altered and has merely been more clearly expressed and set out in the amended pleadings. The learned Judge was accordingly correct in dismissing the special plea.
(My translation, omitting the citation of the various authorities mentioned in the original text.)

should be ordered to be costs in the cause in the action. The defendants sought costs even if their opposition should be unsuccessful because, so it was argued, the opposition had not been unreasonable. In my judgment, however, it would be appropriate if there were no order as to costs, for whilst the defendants were unsuccessful in their opposition to the amendment, the plaintiff was seeking an indulgence by having to apply for it.

**A.G. BINNS-WARD**
**Judge of the High Court**

## APPEARANCES

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|---|---|
| **Applicant / Plaintiff's counsel:** | **T. Dicker SC** |
| **Applicant / Plaintiff's attorneys:** | **Jonker Vorster Inc**<br>**Paarl**<br><br>**De Waal Boshoff Attorneys**<br>**Cape Town** |
| **Respondent / Defendants' counsel:** | **S. Güldenpfennig SC** |
| **Respondent / Defendant's attorneys:** | **Corne Güldenpfennig Attorneys**<br>**Centurion**<br><br>**Shepstone & Wylie**<br>**Cape Town** |