IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 7212/2021

DATE: 2021.11.10

In the matter between

PHANTO PROPS (PTY) LTD	Applicant
and	
LA CONCORDE HOLDINGS (PTY) LTD	First Respondent
VAN DER SPUY (WESTERN CAPE INC) t/a VAN DER SPUY & PARTNERS	Second Respondent
SAREL VAN DER BERG	Third Respondent

Ex tempore JUDGMENT

(Leave to amend)

BINNS-WARD, J: In this matter the plaintiff in the action has applied to amend its particulars of claim in the respects set out in its Rule 28(1) notice delivered on 21 June 2021.

The notice in question provides for a number of proposed amendments; two of which, those set out in paragraphs 2 and

3 of the notice, gave rise to an objection by the first defendant, which in turn led to the current application for leave to amend the particulars of claim consistently with what was adumbrated in those paragraphs.

By the time the matter came to hearing, however, the only issue remaining in contention was the first defendant's objection to the proposed amendment to paragraph 27 of the particulars of claim.

10

Paragraph 27 of the particulars of claim was concerned with the allegation regarding the quantification of the damages claimed by the plaintiff in respect of the defendant's alleged breach of contract. As currently pleaded, it provides that "The reasonable market value of the water rights is R300 000 per hectare therefore R4 740 000", being the quantum of damages claimed for the first defendant's failure to deliver land with stipulated water rights.

20 The plaintiff proposed to amend that paragraph by adding the sentence:

> "The market value of the water rights per hectare is calculated by subtracting the average price per hectare of arable agricultural land without any water rights from arable land with water rights in

the Robertson area."

In my view, the issue, in considering whether the amendment should be allowed, distils into whether the pleading, amended as proposed, would be compliant with Rule 18(10) of the Uniform Rules of Court which provides:

> "A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof".

The subrule continues, in respect of damages claimed in respect of personal injury, by saying:

> "Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries and the nature, effect and duration of the disability alleged to give rise to such damages and shall as far as practicable state separately what amount, if any, is claimed for:
>
> (a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;
>
> (b) pain and suffering, stating whether temporary

or permanent, and which injuries caused it;

(c) disability in respect of:

(1) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

10

(2) the enjoyment of amenities of life (giving particulars) and stating whether the disability concerned is temporary or permanent); and

(d) disfigurement with a full description thereof and stating whether it is temporary or permanent."

20 Rule 18(10) in its current form was part of the overhaul of Rule 18 introduced by way of amendments to the rules made as long ago as 1987. Historical investigation will show that prior to those amendments any deficiency in particularity in a declaration or particulars of claim could be addressed by the defendant requesting further particulars for the purposes of pleading. Those historical provisions were taken away and replaced by rule 18(10) in respect of damages claims. In my

view, it clearly follows therefrom that a pleading in a damages claim now has to contain far greater particularity in respect of the calculation or making up of that claim than had previously been the case.

Subrule 18(10) is additional to, and distinguishable from, Rule 18(4). Rule 18(4), which as far as memory serves, is still in the form that it was prior to the 1987 amendments, requires that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

Rule 18(4) only requires that a pleading should set out the facts necessary to make out a cause of action; in other words, to use the technical term, "the *facta probanda*". Rule 18(4) does not require a pleader to set out the *facta probantia*.

Some of the material in 18(10) in respect of claims for damages for personal injury certainly amount to particularity of the *facta probantia* - something more than the *facta probanda* – and, in my view, the particularity required in respect of damages for personal injury in terms of the subrule gives some indication of the rulemaker's intention in determining on the

rule in the first place, which is expressed in the opening phrase of the sub rule requiring a plaintiff suing for damages to set them out in such manner as will enable the defendant reasonably to assess the quantum thereof.

The rulemaker obviously could not be expected to conceive of every possible type of damages claim and to provide expressly therefor. It no doubt provided expressly what was required in respect of allegations in support of a claim for damages for personal injury because that is a commonplace example of a damages claim. But in laying out what it did in respect of the requirements for pleading a damages claim for personal injury it may, in my view, be inferred that it was also giving an indication of the sort of particularity that, by analogy, might be expected of a pleader in any form of damages claim.

Mr Van Staden SC, in arguing in support of the application for amendment, emphasised the difference between a pleading which fails to comply with the particularity required in terms of rule 18 and an excipiable pleading, and sought on that basis to distinguish the current case from the cases in regard to applications for amendments to pleadings which held that such application should not be allowed when the result would be an excipiable pleading.

I accept, on the basis of the authorities to which he referred, the reasoning whereof I have no difficulty with, that there is a distinction between an excipiable pleading and a pleading non-compliant with rule 18. Whether the distinction should form a basis to refuse applications for amendment of pleadings that would result in an excipiable pleading and allow an amendment resulting in a pleading which would be non-compliant with rule 18 is, however, a concept with which I have great difficulty.

10 By allowing an amended pleading non-compliant with rule 18, a court would necessarily thereby be permitting a pleading to be brought into being that would be deemed, in terms of rule 18(12), to be an irregular step. It seems to me undesirable for a court to make itself party to any such process or procedure.

Mr Van Staden also emphasised that one of the weighty considerations to be considered by a court in applications for the amendment of pleadings is whether allowing the amendment would result in any prejudice to the opposing
20 party. He submitted that the first defendant in this case had failed to establish the existence of any such prejudice. I understood him thereby to say that there would be nothing thereafter inhibiting the first defendant from proceeding against the pleading in terms of rule 30.

That submission goes against the observation of Mr Justice Cloete in the matter of *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992(4) SA 466 (W) at 470H, where the learned judge said:

> "In my view if a pleading does not comply with the sub rules of rule 18 requiring specified particulars to be set out, prejudice has *prima facie* been established. Cases may well arise where a party would not be prejudiced by the failure to comply with these sub rules or where a pleader would be excused from providing the prescribed particularity because he is unable to do so but in such cases the onus would in my view be on him to establish the facts excusing his non-compliance. The law reports abound with cases which lay down this principle in respect of other rules of court and the same principle applies in my view in relation to non-compliance with rule 18."

I find myself in respectful agreement with those *dicta*.

In my view, if the proposed amendment is non-compliant with Rule 18(10), the plaintiff in this case has not shown that it would not be prejudicial to the other party. On the contrary, the position would appear to be that allowing the amendment

would militate towards further unnecessary litigation in this matter. That could be avoided if the proposed amendment were improved to bring it into compliance with rule 18(10). If the application for amendment were refused, it would be within the plaintiff's power to take such ameliorating steps.

I am of the view that the proposed amended pleading does not cure the apparent current non-compliance with rule 18 of the allegation made in paragraph 27 of the particulars of claim.

10

The reference to market value in paragraph 27 of the proposed amended particulars of claim does not provide sufficient particularity to enable the defendant reasonably to assess its cogency. One is not told in the proposed amendment what the market value per hectare with water rights used by the plaintiff for the purposes of quantifying its damages is, or what the market value price per hectare of arable land without any water rights from arable land is. One is also not told as of what date or period the market value calculations were done.

20

In the result what is proposed to be pleaded is, to say the least, opaque. That is something which is contraindicated by the requirements and evident object of rule 18(10).

I consequently intend to uphold the first defendant's objection

to the proposed amendment to paragraph 27 of the particulars of claim.

The application will therefore be allowed in terms of paragraph 2 of the notice of motion save in respect of paragraph 3 of the notice of intention to amend under rule 28(1) delivered on 21 June 2021.

Relief will also be granted, insofar as necessary, in terms of paragraph 1 of the notice of motion.

The first defendant initially objected to the proposed amendment of paragraph 23 of the particulars of claim but, as mentioned earlier, did not persist with that. I heard Mr De Jager's submissions in respect of the first defendant's position in respect of its initial objection to paragraph 23 and understand from that that the fact the objection is not persisted with at this stage does not mean or imply that it will not in some form be pursued later in the proceedings. I am only concerned at this stage with its role in the current proceedings. It did give rise and take up some of the paper and energy that has been involved in the current application.

In the circumstances I do not propose to allow the first defendant its full costs of opposition. I think it would be

appropriate in the circumstances to order that the plaintiff/ applicant pay two-thirds of the first defendant/respondent's costs in the application for leave to amend the pleadings.

In the result an order will be issued in the following form:

1. An order is granted in terms of paragraphs1 and 2 of the notice of motion, save that in respect of paragraph 2, leave is refused to amend the particulars of claim in terms of paragraph 3 of the plaintiff's rule 28(1) notice dated 21 June 2021.

2. The plaintiff/ applicant is ordered to pay two-thirds of the first defendant/ respondent's costs in the application for leave to amend.

BINNS-WARD, J

JUDGE OF THE HIGH COURT